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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

NO. 72-126

BOYER BROTHERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Boyer Brothers, Inc., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled matter on May 10, 1972.

OPINION BELOW

The opinion below by the United States Court of Appeals for the Third Circuit is reported at 448 F. 2d 555 and a conformed copy of such opinion is appended to this petition as Appendix A hereto. In addition, the original decision of the National Labor Relations Board, the administrative agency in the case, is appended to this petition as Appendix E hereto.

Because the case of *N.L.R.B. v. Gissell Packing Company*, 395 U.S. 575, which was decided after the N.L.R.B.'s original decision, announced principles affecting subject case, the United States Court of Appeals for the Third Circuit remanded subject case to the National Labor Relations Board for further consideration. Such order of remand is appended hereto as Appendix F. Subsequently, the National Labor Relations Board issued a supplemental decision upholding its original order which is appended to this petition as Appendix G.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1). The judgment of the United States Court of Appeals for the Third Circuit was entered on May 10, 1972, a copy of which is appended hereto as Appendix B. In addition, a petition for rehearing was denied by the said Court of Appeals on June 22, 1972 (infra, Appendix C).

QUESTION PRESENTED

DID THE COURT BELOW ERR IN OVERRULING A FINDING BY THE NATIONAL LABOR RELATIONS BOARD WHICH FINDING HAD NOT BEEN EXCEPTED TO BY ANY OF THE PARTIES.

STATUTE INVOLVED

The statute involved is the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*); the relevant provisions of which are as follows:

"Sec. 8(a) It shall be an unfair labor practice for an employer—"

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

(29 U.S.C. Sec. 158(a)(5))

* * *

REPRESENTATIVES AND
ELECTIONS

"Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."

* * *

"Sec. 10(e) The Board shall have power to petition any court of appeals in the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record of the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. *No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.* If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of addi-

tional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

(29 U.S.C. Sec. 159(a), 160(e))

* * *

The rules and regulations of the National Labor Relations Board involved are, as follows:

"Sec. 102.48(d) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. *A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. . .*"

(29 C.F.R. 102.48(d))
(emphasis supplied.)

STATEMENT

The National Labor Relations Board conducted a representation election among the company's employees on August 17, 1966, to determine if they wished to be represented by the union.* The election followed a hard-fought election campaign during which the company committed unfair labor practices that the Labor Board found interferred with the first election. As a result the Labor Board set the 1966 representation election aside.

However, instead of allowing a rerun election to determine if a majority of the employees desired to be represented by the union, the Court below enforced an order of the Labor Board ordering the company to bargain with the union. The decision was predicated upon a determination that the union possessed a majority of validly executed authorization cards (104/207, a majority of one) and the further determination by the Labor Board that union authorization cards signed by employees in the spring of 1966 "represent a more reliable measure of employee desires on the issue of representation than would a rerun election" (Appendix G, p. 82a).

Therefore, it is the validity of the union authorization cards which is in question. The validity of several individual authorization cards were considered by the Court below and the effect of the lower Court's ruling was to give the union a majority of only one authorization card.

For purpose of this petition the issue is further narrowed to the validity of union cards solicited by a supervisor. The Labor Board found that supervisor Betty Henry solicited

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* The Union involved is the Bakery and Confectionery Workers International Union of North America.

signatures—more than one—on union authorization cards for the union but excused such supervisory conduct on three grounds, each of which was rejected by the Court below. The lower Court did refuse to count one card solicited by the supervisor, but because of the paucity of evidence of supervision solicitation, refused to invalidate any of the other authorization cards. Concerning the crucial Board finding that the supervisor had, in fact, solicited signatures —more than one—on the union cards, the lower Court stated:

> "We conclude that the Board's finding that Betty Henry had solicited signatures is not supported by substantial evidence" (Appendix A, p.18a).

No objection to this Labor Board finding was ever raised by the parties either before the Board or before the lower Court.

Thus, the issue involved in subject petition is a narrow one—whether to have the lower Court accept as binding upon it the unexcepted to finding made by the National Labor Relations Board which ruled that supervisor Betty Henry solicited signatures on union authorization cards from among employees.

REASON FOR GRANTING THIS WRIT

If this Court instructs the lower Court to let stand the unexcepted to Board finding, then the union's card majority is destroyed because the union never possessed a majority of validly executed authorization cards. This is true because the lower Court rejected the Labor Board's reasoning as to the effect of supervisors soliciting union authorization cards. The lower Court cited with approval the rule that union cards solicited by supervisors may not be considered in determining a union's majority status. *N.L.R.B. v. Hawthorne Aviation*, (C.A. 10), 406 F.2d 428, 430-431; *Pulley v.*

N.L.R.B., (C.A. 6), 395 F.2d 870. The apparent contrary holding in the case of *International Union, UAW v. N.L.R.B. (Aero Corp)*, (C.A. D.C.), 363 F.2d 702, 708-709, is distinguishable on the ground that the cards there solicited were not controlling to establish majority status whereas in subject case the signatures—more than one—procured by Betty Henry are now controlling.

Section 10(e) of the National Labor Relations Act provides in pertinent part as follows:

> "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances..." 49 Stat. 454, as amended, 29 U.S.C. Sec. 160(e).

There is no contention made that the Counsel for General Counsel or the Union filed objections to this Board finding or that extraordinary circumstances prevented them from objecting to such Board finding. If they did not agree with the Board finding it was incumbent upon them to have filed a motion for reconsideration before the Board under 29 C.F.R. Section 102.48(d). See *Glaziers Local No. 558 v. N.L.R.B.*, (C.A. D.C., 1969), 408 F.2d 197, 202-203, and cases cited there in footnote 12.

This precise issue has previously been brought before this Court on numerous occasions and in each instance this Court has ruled that a Court of Appeals cannot make any changes in a Board finding to which no objection was raised by the parties before the Board. See, for example, *N.L.R.B. v. Ochoa Fertilizer Corporation*, 368 U.S. 318, 322; *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 388-389; *Marshall Field & Co. v. N.L.R.B.*, 318 U.S.

253; *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 386; *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350; *N.L.R.B. v. District 50, United Mine Workers of America*, 355 U.S. 453, 463-464.

CONCLUSION

For the foregoing reason Petitioner submits that this petition for a writ of certiorari should be granted and the case remanded for further consideration.

Respectfully submitted,

GEORGE V. GARDNER,
ASA AMBRISTER,

Counsel for Petitioner.

Appendix

APPENDIX A

[fol. 1]

OPINION OF THE COURT BELOW

Decision of the United States Court of Appeals
For the Third Circuit in No. 17,843

(Filed September 9, 1971)

Before Staley, Adams, *Circuit Judges* and
Garth, *District Judge*

Garth, *District Judge*.

The question before the Court in this proceeding is the validity in various sets of circumstances of cards signed by employees which purport to authorize a union to represent these employees vis-a-vis their employer. The N.L.R.B. found that a majority of the employees of Boyer Brothers, Inc. (hereinafter referred to as the Company) validly authorized The Bakery and Confectionery Workers' International Union of America, Local No. 12 (hereinafter referred to as the Union) to represent them.

[fol. 2] The Board petitions this Court[1] for enforcement of an N.L.R.B. order which prohibits the Company from engaging in specified unfair labor practices designed to prevent unionization of its employees and which compels the Company to bargain with the Union.

In May, 1966 the Union began a drive to organize the employees of the Company and on July 7, 1966 requested

1. Jurisdiction rests upon Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e).

the Company to engage in collective bargaining. The Union claimed it possessed at that time authorization cards from a majority of the employees in the appropriate unit. The Company, however, refused to recognize the Union. On August 17, 1966 an election was held to determine the status of the Union. The Union was defeated by a substantial margin.

The Union filed a charge with the N.L.R.B. shortly after the election. On April 3, 1967 hearings began before the trial examiner at which many of the employees of the Company testified and were subject to cross-examination. After the issuance of the trial examiner's decision on October 26, 1967, the Company moved on December 13, 1967 to reopen the record to present newly discovered evidence. On April 5, 1968 the N.L.R.B. denied the Company's motion and adopted the findings and affirmed the rulings of the trial examiner. On that date the N.L.R.B. ordered that the representation election be set aside because of specified unfair labor practices,[2] and

---

2. The Company's activities were found by the N.L.R.B. to include the following:

> ". . . [T]he Respondent, among other things, promulgated and enforced an unlawful rule against union solicitation at any time on its premises; interrogated employees with respect to their union activities, sympathies, and the activities of other employees; threatened to discharge employees if they continued to engage in union activities; gave employees the impression that it maintained surveillance of their union activities; held out to one employee the prospect of promotion after urging him to consider carefully the consequences of voting for the Union; promised employees improvements in holiday and vacation benefits, and timed announcements of the promised improvements in a manner calculated to influence the outcome of the election; and assigned onerous work to one individual because of his activities on behalf of the Union."

[fol. 3] that the Company be required to bargain with the Union on the basis of the Union's designation on a majority of valid cards signed by the employees.

The N.L.R.B. petitioned this Court for enforcement of its order of April 5, 1968. On August 18, 1969 this Court remanded the entire case for reconsideration by the Board in the light of the landmark case of N.L.R.B. v. Gissel Packing Co., et al., 395 U.S. 575, *reh. denied*, 396 U.S. 869 (1969). In its Supplemental Decision and Order of March 3, 1970, the N.L.R.B. reaffirmed its initial decision, stating that "the unambiguous cards validly executed by a majority of the employees in the unit represent a more reliable measure of employee desires on the issue of representation than would a rerun election." The Board ruled that the Company's unfair labor practices were so substantial and pervasive and had so damaging an impact upon election processes that a rerun election would have been ineffective and unreliable.

In its Statement of the Issues before this Court, respondent concedes that substantial evidence supports the N.L.R.B.'s findings that the Company committed unfair labor practices in violation of 29 U.S.C. § 158(a)(i) in all the respects found by the Board. Consequently these findings are deemed conclusive in this proceeding. That part of the order of the N.L.R.B. which prohibits specified unfair labor practices will be enforced.

The remaining determination for this Court is the validity of the provision of the N.L.R.B. order which compels the Company to bargain with the Union. Section 159(a) of Title 29, U.S.C., provides in pertinent part that:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

[fol. 4]

Whether a majority of the employees in the appropriate unit designated the Union as their representative is the chief contested issue. It is agreed that the bargaining unit at respondent's factory included 207 employees at the time of the Union's demand for recognition. Hence 104 employees must have designated the Union to represent them in bargaining in order to constitute a majority.

The N.L.R.B. found that authorization cards had been validly executed by 106 of the Company's employees. The Company contends that a majority was not obtained by the Union and specifically attacks the Board's inclusion in its count of the cards of 9 employees among those who authorized Union representation.

We find that only two authorization cards were improperly counted (those of employees Burns and Rinker) and conclude that substantial evidence supports the N.L.R.B.'s finding that a majority of the employees in the appropriate unit designated the Union as their representative.

Card of Harry Burns

The card executed by Harry Burns should not have been counted. Before signing, Burns altered the statement printed on the card. Originally that statement was printed as follows: "I hereby apply for membership in The Bakery

and Confectionery Workers International Union of America, Local No. ....., and I authorize and designate that Union to represent me for collective bargaining with my employer." Burns lined through the word "membership," substituting another phrase for that word, and thereby caused the card to state: "I hereby apply for information of what you can do for me."

[fol. 5] The Board counted Burns' card in accordance with a finding that in leaving intact the entire last clause of the card's statement, Burns knowingly differentiated between union membership, which he did not request, and authorization of the Union as his representative. The record does not present substantial evidence to support this finding.

Effect is to be given to words inserted in the body of an existing form, even if to do so requires a rejection of uncancelled provisions of the original draft. Marine Insurance Company v. M'Lanahan, 290 F. 685 (4th Cir. 1923). On the other hand, a correct construction of an instrument may be obtained by drawing the negative inference that if only one word or phrase of a sentence is stricken, the drafter intended that the others should retain their effect. But this latter proposition assumes that the draftsman has carefully read the sentence and deliberately concluded that the unstricken words express his intention.

Here, however, Burns when asked why he struck one phrase and not the other, stated to the N.L.R.B. trial examiner that "I really didn't give it that much thought I guess." Moreover, Burns' lack of meticulousness is further evidenced by the fact that he struck only the word "membership" and not the remainder of the first clause (". . . in the Bakery and Confectionery Workers Interna-

tional Union of America, Local No. . . ."). To the extent Burns may have actually thought about the editing of his card, we feel the only realistic interpretation is that offered by Burns: "Well, I thought membership, I thought if you were a member or something they represented you. If you wasn't [sic] a member they didn't."

Card of Margaret Ebling

Margaret Ebling testified that in signing a card she relied upon a representation that her authorization would remain confidential but stated that this representation was subsequently violated. The fact that the representation as to confidentiality was breached is irrelevant [fol. 6] to the reliability, and hence validity, of a union authorization card. N.L.R.B. v. Consolidated Rendering Co., 386 F.2d 699, 702 (2d Cir. 1967); N.L.R.B. v. Southbridge Sheet Metal Works, Inc., 380 F.2d 851, 856 (1st Cir. 1967). The Ebling card was properly counted.

Card of Gary Runk

The Company asserts as a basis for exclusion that although Gary Runk may have signed a valid authorization card, he did not deliver the card to the Union. Runk's brother testified that he witnessed the signing of the card and that he heard Runk state his intention to mail the card. Runk himself stated that he mailed the card but was unsure of the addressee. The Runk card was properly counted regardless of the conflicting evidence as to receipt by the Union. *Cf.* N.L.R.B. v. International Metal Specialties, Inc., 433 F.2d 870, 872 (2d Cir. 1970), *cert. denied*, 39 U.S.L.W. 3455 (U.S. April 20, 1971) (held includible a card signed and given to another employee to turn in but never received).

Appendix A

Card of Sandra Nedimeyer Duffield

The Company contends that it was denied an opportunity to cross-examine Sandra Nedimeyer Duffield, and therefore that her card was not properly authenticated. In an affidavit submitted in support of the Company's motion to reopen, Duffield asserted that she was subpoenaed to appear at the N.L.R.B. hearing but was sent home without testifying by a representative of the General Counsel of the N.L.R.B. The General Counsel's office could not recall such an action on its part. Without resolving this factual issue, we believe this card was nevertheless properly counted. In her affidavit this employee made no averment which would call into question the reliability of her signature. We conclude that it was not an abuse of discretion for the N.L.R.B. to refuse to reopen the record with respect to Sandra Nedimeyer Duffield [fol. 7] after hearings had been concluded and the trial examiner had submitted his decision to the Board. Hence, the Duffield card was properly counted.

Card of Shirley McCachren

Shirley McCachren testified at length as to certain conversations and incidents bearing upon the asserted unfair labor practices of the Company. She also testified with respect to the signing of an authorization card stating that she wanted to join the Union.

The trial examiner rejected her testimony concerning the unfair labor practices as not being credible. He nevertheless counted her card together with those of other employees who had, according to the trial examiner's decision, "credibly attested to their own signatures, the date on which they signed the card, and that they read the card before signing it."

The Company contends that because the trial examiner did not find all of this employee's testimony to be credible, her card should not be counted. This argument overlooks the right of the fact-finder to give such credence to any given part of her testimony as he may think it deserves. As stated it was largely in connection with the unfair labor practices that the trial examiner observed that her demeanor was poor. The mere fact she was rejected as a credible witness as to certain parts of her testimony did not compel the trial examiner or the Board to disbelieve every other part of her testimony. The McCachren card was properly counted.

Card of Marbara McPhee and Elizabeth Park

The Company's objections to the cards of Barbara McPhee and Elizabeth Park raise issues decided in N.L.R.B. v. Gissel Packing Co., *supra*. In *Gissel* the Supreme Court upheld the *Cumberland Shoe* doctrine[3] of the N.L.R.B. and held that evidence of intention in signing an unambiguous single-purpose union authorization card is not pertinent in the absence of evidence that the signing employee was clearly told that the sole purpose of the card was to bring about an election to determine the status of the Union. The cards signed by the employees in the instant case fall within the *Gissel* rule, since they were unambiguous and were used by the employees solely to apply for union membership and to authorize the Union to represent them in collective bargaining.

[fol. 8]

3. Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963), enf'd 351 F.2d 917 (6th Cir. 1965).

Barbara McPhee testified that a co-worker asked her "[i]f I wanted to sign the card to get the union in." The co-worker said nothing further. McPhee, however, stated that "I misunderstood, it was my fault. I thought that they [union officials] would come in to talk [and that the card had no further significance]." In these circumstances it was not a mechanical application by the Board of the *Cumberland* rule to count the card. *See* N.L.R.B. v. Gissel Packing Co., *supra*, 395 U.S. at 608. The primary issue in applying the *Cumberland* rule is the affirmative communication by the solicitor of the card to the employee. L. C. Cassidy & Son, Inc. v. N.L.R.B., 415 F.2d 1358 (7th Cir. 1969). No improper representation was made to McPhee and consequently her card was properly counted.

When asked to sign an authorization card, Elizabeth Park was told that "'. . . practically everyone is voting for the Union'." The N.L.R.B. urges that on June 30, 1966, when Mrs. Park appears to have signed the card, a majority of the employees had already signed cards. Assuming this to be true, the ordinary meaning of "practically everyone" is nevertheless not a mere half plus one. The solicitor's assertion was assuredly false in view of the closeness of the count in this case.

The *Gissel* case is not dispositive of the dispute regarding Mrs. Park's card. She testified at the hearing that she would not have signed her card had she known that cards had not yet been signed by practically everyone.

> While *Gissel* rejects, as unreliable, inquiry into the subjective intention of an employee who has signed a card, 395 U.S. at 608, that case does not require that all cards, the signatures of which are subsequently regretted, go unchallenged.

[fol. 9]

The teaching of *Gissel* is that the *purpose* of an employee in signing a card is conclusively presumed to be authorization of the Union to represent him if the card signed so states unambiguously and if no one has explicitly represented to him that the card has a different purpose. *Gissel* does not deal with misrepresentations regarding matters other than the purpose of the card. Similarly, signatures obtained by duress are not protected from attack by *Gissel*.

Misrepresentation that a majority of employees have already signed authorization cards does not in every case require invalidation of a card signed in reliance thereon. In Local 153, I.L.G.W.U. v. N.L.R.B., 443 F.2d 667 (D.C. Cir. 1970), *cert. denied*, 91 S. Ct. 2206 (1971), it was held that such a misrepresentation is fatal only where it is a means of coercing the employee through fear of majority reprisal. *Accord*, Amalgamated Clothing Workers of America v. N.L.R.B., 365 F.2d 898, 908 (D.C. Cir. 1966).

The record before this Court does not present any evidence of a deliberate attempt to coerce Park by creating or exploiting a fear of majority reprisal. She testified that she ". . . was anxious to make friends there [at the Company's plant], . . . was new there, scared, and nervous and . . . thought, well, this is the way, you know—[to make friends and get with the group]." There is no evidence, however, that Mary Blake, who solicited the card from Park, threatened her with majority reprisal. In fact Park provoked the alleged misrepresentation by asking, "How are the other girls voting?" The Park card was properly counted.

Appendix A

Supervisor Solicitation of Cards

We turn now to the problems raised by the alleged solicitation of signatures of cards by Betty Henry.

[fol. 10] After the conclusion of the Board's hearings and the submission of the trial examiner's decision, the Company moved to reopen the record on the issue, *inter alia*, of Betty Henry's solicitation. The Company invoked the well-established rule that cards solicited by supervisors are invalid and may not be counted. N.L.R.B. v. Hawthorne Aviation, 406 F.2d 428 (10th Cir. 1969); Pulley v. N.L.R.B., 395 F.2d 870 (6th Cir. 1968). Although the Company submitted two affidavits which it characterized as newly discovered evidence, the Board in its order of April 5, 1968 denied the Company's motion to reopen on the ground that neither the motion nor the affidavits contained any allegation which, if proved, would affect the outcome of the case.

The reasoning of the Board on this point was set forth in its Supplemental Decision and Order of March 3, 1970:

"Betty Henry solicited signatures on authorization cards and generally manifested her support for the Union before any claim was made by the Respondent that she had supervisory status. Indeed, the Respondent and the Union had stipulated for purposes of the election that Henry, and 11 others employed in the same category, were eligible to vote. Thereafter, the Trial Examiner held, and we agreed, that Henry and the 11 others were supervisors. This precluded the use of their cards in ascertaining the Union's majority status. It is also true that, as a general rule, the Board will not accept cards solicited by supervisors as evidence of majority status. However, in the circumstances of this case, we hold that the cards solicited by Henry

may be used for this purpose. The fact that Henry was represented by the Respondent not to be a supervisor, that she was, in fact, discharged for demonstrating her support for the Union, and that the Respondent itself undertook an intensive and unlawful campaign to defeat the Union, rebuts any presumption that Henry's [fol. 11] solicitation of cards might have coerced employees into designating the Union against their wishes. See also *Aero Corporation*, 149 N.L.R.B. 1283, 1286-1287, affd. 363 F.2d 702 (C.A.D.C.)."

We cannot agree that the circumstances of this case rebut the presumption of an improper effect of Betty Henry's solicitation (to the extent such solicitation actually took place). The rationale for excluding cards solicited by supervisors is that the authority they hold over employees provides ". . . a basis for potential tyranny when improperly exercised by a supervisor thwarted in his aim to obtain union recognition. . . ." N.L.R.B. v. Heck's Inc., 386 F.2d 317, 322 (4th Cir. 1967). None of the circumstances referred to by the Board provides a reason for distinguishing Betty Henry's case from the general rule.

The trial examiner found that Betty Henry, as a "line-supervisor" before her discharge on July 14, 1966, possessed the power to recommend to management that an employee assigned to her be disciplined or even fired, and he found that management frequently adopted such recommendations by supervisors after independent investigation. Henry could send home improperly dressed employees after consultation with management. Moreover, line-supervisors were asked to evaluate employees for purposes of salary increases. The record also shows that Henry had authority to assign employees under her supervision to particular jobs. The supervisor exclu-

sionary rule was designed to invalidate authorization cards obtained through the exploitation of just these types of powers.

That the Company at one time may have represented that line-supervisors generally or Betty Henry in particular were eligible to vote[4] does not preclude application of the supervisor exclusionary rule. The Company is not estopped from asserting that Betty Henry is a [fol. 12] supervisor by reason of the stipulation. Montgomery Ward & Co., Inc., 115 N.L.R.B. 645, 647. Nor should the designation given to a worker by his employer be given weight when the proof, as here, shows the actual possession of powers inconsistent with that designation. *Cf.* N.L.R.B. v. Heck's Inc., *supra* (where the court rejected as immaterial the contention that employees did not think of their department heads as "supervisors").

The second circumstance mentioned by the Board is that Betty Henry was discharged by the Company for demonstrating her support for the Union. But if before her discharge she possessed power over employees and solicited signatures during this period, her subsequent ouster by the Company is irrelevant. There is no evidence in the record to indicate that any employees whose signatures might have been solicited by Henry knew prior to her discharge that her position in the Company had become so tenuous that she had in effect been deprived of her normal powers as a supervisor.

Finally, the Board in finding an exception to the rule, relied on the fact that the Company had undertaken an in-

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4. Betty Henry was not included as an employee eligible to vote in the election in the August 8, 1966 stipulation between the Union and the Company, since she had previously been discharged.

tensive and unlawful campaign to defeat the Union. But the supervisor exclusionary rule was applied in spite of the same contention in N.L.R.B. v. Heck's Inc., *supra*, 386 F.2d at 322. An employee solicited by Henry to sign a card for the Union would have known of her power to recommend disciplinary action or a promotion. But while ultimate authority on such questions rested with management, the employee could not reasonably have expected that Henry would no longer exert influence on management after the Union's status had been determined. Further, the employee might have had reason to fear that Henry might harbor grudges against those who did not comply with her requests on behalf of the Union.

Although we find that the Board erred in its reasoning regarding solicitation by supervisors, we nonetheless shall enforce the Board's order, in view of the paucity of evidence of solicitation by Henry. Prior to the [fol. 13] Company's motion to reopen, the record contained no evidence of solicitation by Betty Henry of union authorization cards.

Henry had testified that she herself had signed such a card, that she went to at least one union meeting before her discharge (and to a total of six or seven meetings), and that before her discharge she obtained 15 to 20 authorization cards from a union organizer for distribution to employees who actively solicited signatures from others.[5] She denied any distribution by her directly to employees for their signatures and denied that she ever solicited signatures. Judy Terry, Gary Neff and Mona Hancock (who, like Betty Henry, was a line-supervisor) received

5. After her discharge Betty Henry apparently distributed a similar number of cards to the same solicitors.

cards from Henry for distribution. They testified at the hearing but provided no evidence that their solicitation activity or their own signing of cards was caused or even encouraged by Betty Henry. Rather, it appears from the only evidence on the issue that "[t]hey [Judy Terry, Gary Neff and Mona Hancock] asked me [Henry] to get them cards to hand out to other people." We hold that this activity did not constitute solicitation on the part of Betty Henry.[6]

Numerous employees testified at the hearing that they had signed authorization cards after solicitation by Judy Terry or another recipient of cards from Henry. None of these employees testified to any awareness on his part of Henry's participation in the Union drive. Hence, Betty Henry's Union role was unknown to those who might otherwise have been influenced by her position as a supervisor.[7]

[fol. 14] *Cards of Karen Reeseman and Carol Rinker*

The only evidence of solicitation by Betty Henry is contained in affidavits submitted after the conclusion of the hearing by the Company upon its motion to reopen the proceedings. In her affidavit of November 25, 1967 Karen

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6. The record also indicates that a number of cards were returned to Betty Henry's home after employees had signed them. It does not appear, however, from the record that employees other than the solicitors delivered the signed cards to Henry or knew of her function on behalf of the Union.

7. Apart from its contention that particular cards must be excluded because of solicitation by Betty Henry of the employees who signed them, the Company appears to argue that Henry's activity on behalf of the Union taints all the cards comprising the Union's majority. Whatever may be the merit of a taint argument where direct or indirect solicitation has been pervasive, **e.g.**, N.L.R.B. v. Heck's Inc., **supra**, the argument is inappropriate in this case, where no such proofs appear in the record. Cf. International Union, United A., A. & A. Imp. Wkrs. v. N.L.R.B. (Aero Corp.), 363 F.2d 702 (D.C. Cir.), **cert. denied**, 385 U.S. 973 (1966).

Reeseman, an employee of the Company, stated that she signed an authorization card ". . . because Betty Henry . . . persuaded me to do so. She talked with me every day she saw me during the campaign until I finally signed the card. During this period she talked to many people and pressured Carol Rinker into signing a card. She had Carol Rinker scared and Carol came to me and told me about it." Carol Rinker, another employee who signed a card, stated in her affidavit of November 27, 1967: "I was scared from all the pushing to get the cards signed. Romeo, Sandy, and Betty Henry were doing the pushing. Betty Henry did approach me about the cards at one of the tables."

The Board denied the motion to reopen the proceedings which was based upon these affidavits.[8] That ruling will not be disturbed in the absence of an abuse of discretion, N.L.R.B. v. Yale Manufacturing Company, 356 F.2d 69, 71 (1st Cir. 1966). We conclude that there was no abuse of discretion in the denial of the motion, except with respect to the card of Carol Rinker, which should have been excluded.

[fol. 15] Karen Reeseman had testified at the N.L.R.B. hearing on April 5, 1967. The matters set out in her affidavit of November 25, 1967, were known to her at the time of the hearing. Counsel for the Company at the hearing[9] was well aware of the significance of any

8. The Company's motion to reopen the record raised, in addition to the issue of solicitation by Betty Henry, the alleged misrepresentation to Sandra Nedimeyer Duffield, discussed above, and the claim that Robert Shaw signed a card solely to bring about an election. This latter argument was not urged in the Company's brief before this Court and consequently is considered to have been abandoned.

9. After the hearing the Company substituted new attorneys who moved to reopen the proceedings.

solicitation by Betty Henry.[10] Counsel's failure to elicit such testimony before the hearing was concluded is unexcused. Certainly, the subject matter of the Reeseman affidavit was not "newly discovered evidence." The interests of fairness and substantial justice did not require the Board to consider the Reeseman affidavit. *Cf.* Partin v. N.L.R.B., 356 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 829, *reh. denied*, 385 U.S. 953 (1966). Hence the Reeseman card was properly counted.[11]

The affidavit of Carol Rinker, however, should have been considered by the Board, since she had been unable to appear and testify at the hearing due to serious illness which required her hospitalization. Her affidavit sets forth newly discovered evidence which, in these circumstances, required the Board to exercise its discretion to reopen the record. Carol Rinker's card should have been excluded due to improper solicitation.

It does not follow, however, that a new hearing was required at which the several hundred employees [fol. 16] of the Company would testify for a second time. *Aero Corp.*, *supra*. Rinker's affidavit shows that her card was improperly solicited by Betty Henry; but nothing in her affidavit supports an inference that other cards were so solicited. That ". . . Betty Henry . . . [was] doing the pushing [for cards]," as averred by Miss Rinker, is ambiguous and inconclusive regarding the ex-

10. During the interrogation of Betty Henry at the hearing on April 3, 1967, Mr. First, then counsel for the Company stated: "Oh, this is the very heart of this case. I must know in great detail the extent to which supervisors were engaged in Union activities."

11. One of the circumstances relevant to the Board's exercise of discretion in this regard was the fact that Reeseman's testimony at the hearing was extremely weak, culminating in her admission that not all of the contents of an affidavit previously sworn to by her was true.

posure of employees other than Miss Rinker to solicitation by Betty Henry.

We conclude that the Board's finding that Betty Henry had solicited signatures is not supported by substantial evidence, except in the one instance, discussed above, of Carol Rinker.

Accordingly, after excluding the Burns and Rinker cards, there remain 104 valid authorization cards, which still constitute a majority of the employees in the bargaining unit.[12] The April 5, 1968 order of the N.L.R.B. will therefore be enforced, notwithstanding that our reasoning in reaching this conclusion differs from that of the Board.

The Board may submit a decree in accordance with this opinion.

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12. Our decision that a majority (104/207) of the employees signed valid authorization cards makes it unnecessary to consider the Company's contention that a rerun representation election should be held.

APPENDIX B

[fol. 1]

JUDGMENT OF THE COURT BELOW

Order dated May 10, 1972

In No. 17,843 in the United States Court of Appeals
For the Third Circuit

Before: STALEY, ADAMS, Circuit Judges and GARTH, District Judge.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Boyer Bros., Inc., its officers, agents, successors, and assigns, on March 4, 1970. The Court heard argument of respective counsel on June 11, 1971, and has considered the briefs and transcript of record filed in this cause. On September 9, 1971, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced and that Boyer Bros., Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

BY THE COURT

DATED:
May 10, 1972

ARLIN M. ADAMS
Circuit Judge

APPENDIX C

[Caption Omitted]

SUR PETITION FOR REHEARING

Present: Judge Seitz, *Chief Judge*, Judges Staley, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Rosen, Hunter, *Circuit Judges* and Judge Garth, *District Judge*.

The petition for rehearing filed by

BOYER BROTHERS, Inc.

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ARLIN M. ADAMS
Judge

Dated: June 22, 1972

APPENDIX D

[fol. 1]

ORDER STAYING MANDATE

Order of the United States Court of Appeals
For the Third Circuit Dated June 27, 1972

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 22, 1972.

/s/ Arlin M. Adams
Judge

Dated: 6/27/72

APPENDIX E

1 OPINION AND JUDGMENT OF THE ADMINISTRATIVE AGENCY INVOLVED

Decision and Order
Of The National Labor Relations Board

On October 26, 1967, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled proceeding, finding that the Respondent, Boyer Bros., Inc., had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in answer to the Respondent's exceptions, cross-exceptions to the Decision, and a supporting brief. The Respondent also filed a motion to reopen the record and the General Counsel filed a brief in opposition.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.
2 The Board has considered the Trial Examiner's Decision, the Respondent's motion,[1] the exceptions and briefs, and

1. Neither the Respondent's motion to reopen the record nor the affidavits attached thereto contain any allegation which if proved would affect the outcome of our Decision herein. Accordingly, the Respondent's motion is denied.

the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Boyer Bros., Inc., Altoona, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

IT IS FURTHER ORDERED that the petition for certification filed in Case No. 6-RC-4185 be, and it hereby is, dismissed.

Dated, Washington, D.C. Apr. 5, 1968

/s/ Sam Zagoria
Sam Zagoria, Member

/s/ John H. Fanning
John H. Fanning, Member

/s/ Howard Jenkins, Jr.
Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

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2. The Trial Examiner's Decision incorrectly used July 6 as the date for establishing the Union's majority and finds that of the 208 employees in the unit, 106 had signed authorization cards by that time. We find the critical date to be July 7, the day on which the Respondent received the Union's request for bargaining. Rea Construction Company, 137 NLRB 1769. Accordingly, we shall exclude the card signed by Philip Jenkins, who had concededly left the Respondent's employ by that date.

We shall, however, include the authorization card signed by Elizabeth Park on June 30 after she was told that "practically everyone" had signed. Park's card was excluded by the Trial Examiner. See G & A Truck Line, Inc., 168 NLRB No. 106. In any event, the record shows that, in fact, a majority of cards had been signed by June 30, exclusive of Park's.

Accordingly, we find that 106 employees, constituting a majority of the 207 employees found to be in the unit, have authorized the Union to represent them for purposes of collective bargaining.

Appendix E

[Caption omitted in printing]

9 TRIAL EXAMINER'S DECISION

Statement of the Case

THOMAS F. MAHER, Trial Examiner: Upon a charge filed on August 19, 1966 by Bakery and Confectionery Workers' International Union of America, herein called the Union, the Regional Director for Region 6 of the National Labor Relations Board, herein called the Board, issued a Complaint on behalf of the General Counsel of the Board on January 27, 1967, against Boyer Bros., Inc., Respondent herein,[1] alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151 *et seq.*), herein called the Act. Thereafter on January 31, 1967 the Regional Director issued his order directing a hearing on objections to conduct affecting the results of the election held pursuant to a Stipulation for Certification upon Consent Election among Respondent's employees in Case No. 6-RC-4185. On the same date the Regional Director issued his order consolidating both cases and directing a consolidated hearing. In its duly filed Answer Respondent, while admitting certain allegations of the Complaint, denied the commission of any unfair labor practice.

Pursuant to notice a trial was held before me in Altoona, Pennsylvania, and Washington, D.C. where all parties were present, represented, and afforded full opportunity to be heard, present oral argument and file briefs with me. Briefs were filed by all parties on June 27, 1967. Upon consideration of the entire record, including the

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[1] The caption above includes the name of the Respondent as corrected at the hearing.

10 briefs filed with me, and specifically upon my observation of each witness appearing before me,[2] I make the following:

Findings of Fact and Conclusions of Law

I. The Business of the Respondent

Boyer Bros, Inc., Respondent herein, is engaged in the manufacture and nonretail sale of candy at its Altoona, Pennsylvania, plant. During the most recent twelve-month period it received at its Altoona plant directly from outside the Commonwealth of Pennsylvania goods and materials valued in excess of $50,000. During the same period it shipped from this plant goods and materials valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. Upon these conceded facts it is admitted and I conclude and find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[2] Except where specifically indicated otherwise the credibility evaluations I make of the testimony of witnesses appearing before me is based, at least in part, upon the demeanor of the respective witness as I observed it at the trial and particularly at the time the testimony was given. Cf. Retail Clerks International Association, AFL-CIO, Local 219, 134 NLRB 1680, 1682 in fn. 3; Bryant Bros. Packing Co., 129 NLRB 285. To the extent that I do not rely upon or I reject in part or entirely the testimony of any given witness it is to be understood that I have fully considered such evidence and such other evidence as may be inconsistent with it and that based upon my evaluation of it and a consideration of the demeanor of the respective witnesses, it is my intent thereby to indicate that such a part or all of the testimony, as the case may be, is discredited by me. In this respect "[T]he failure of a Trial Examiner to detail completely all conflicts in the evidence does not mean . . . that this conflicting evidence was not considered. A 'Trial Examiner is not compelled to annotate to each finding the evidence supporting it.'" Bishop and Malco, Inc., 159 NLRB No. 106.

To the extent that I credit any witness only in part I do so upon the evidentiary rule that is not uncommon "to believe some and not all of a witness' testimony." N.L.R.B. v. Universal Camera Corp., 179 F.2d 749, 754 (C.A. 2).

Appendix E

11 II. The Labor Organization Involved

It is conceded by all parties and I conclude and find that Bakery and Confectionery Workers' International Union of America, Charging Party herein, and petitioner in the representation proceedings, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Issues

1. Supervisory status of line supervisors.
2. Interference, restraint and coercion.
3. Imposition of an unlawful no-solicitation rule.
4. The discharge of a statutory supervisor.
5. Refusal to bargain based upon refusal to accept proffered signed authorization cards.

IV. The Unfair Labor Practices

A. *Sequence of Events*

Organizing efforts among Respondent's employees commenced during the latter part of May, 1966. At the outset Union representatives mailed to those employees for whom they had procured home addresses union authorization cards with provision for return mailing. Signed cards were returned by a considerable number of employees to the Union's Pittsburgh headquarters. Meanwhile, in early June, the Union's representatives enlisted the support of interested employees and through their efforts additional signed cards were obtained. Some of these signed cards were procured at the several meetings held thereafter, others by visits of union representatives and active employees to the homes of the employees, and still others by solicitations at the plant before and after work, and during coffee breaks. These cards which formed the

basic substance of this proceeding will be considered in detail hereafter (*infra*, p. 19).

12 On July 6, 1966 Henry S. Alvino, Director of Organization of the Union, directed a letter to W. E. Boyer, Respondent's president, advising him that the Union represented a majority of the production and maintenance employees and requested recognition as their exclusive bargaining representative. In support of his claim and request Alvino stated that "we would be happy to exhibit signed and dated pledge cards demonstrating proof of our majority interest to any neutral third party whom you and we can agree upon." In response to this communication Respondent, by letter of its attorney, Edward C. First, Jr., dated July 8, 1966 stated, in part, as follows:

> Because we have a good faith doubt of the fact that you represent such a majority and a doubt about the circumstances, and ways and means whereby pledged cards may have been executed, we suggest that you file an appropriate petition with the Pittsburgh office of the National Labor Relations Board which you know would have jurisdiction over a representation proceeding on your petition.

Following the receipt of Respondent's rejection the Union filed with the Regional Director on July 11, 1966, its petition in Case No. 6-RC-4185 for an election among Respondent's employees. Thereafter on July 27, Respondent and the Union executed a Stipulation for Certification Upon Consent Election, wherein the election was scheduled for August 17, 1966 and the unit appropriate for collective bargaining was agreed to be

> All production and maintenance employees, truck drivers, shipping and receiving employees at the employer's

Altoona, Pennsylvania location; excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

At the election thereafter conducted 220 of Respondent's
13 241 eligible employees voted, of whom 95 cast votes for the Union, 124 against the Union, with 1 vote challenged. Subsequently, on August 19, 1966, the Union filed timely objections to conduct affecting the results of the election. These objections, after investigation by the Regional Director, have been consolidated by him with the complaint case herein and will be discussed in further detail hereafter (*infra* p. 28).

B. *Supervisors*

Critical to a number of issues that have been raised is the status of a group of twelve individuals claimed by Respondent to be supervisors. Because their status relates not only to their eligibility to vote in the election but also to the part they took in the several incidents related hereafter it would seem appropriate to make a final determination as to them at the outset.

This group, referred to as line supervisors, consists of the following:

Donna Bowmaster	Mona Hancock
Ida Bulman	Betty Henry
Paul Burget	Janet Mauk
Clara Davis	Mary Mauk
Mary DeLozier	Wayne Medesia
Catherine Fyan	Mary Price

All the line supervisors are hourly rated, whereas all the other supervisors are salaried. They attend all meetings

of supervisors, however, and at these meetings participate in discussions relating to production, safety, plant cleanliness and other items of management concern. While they are not empowered to either hire or fire the employees assigned to them they do recommend such action, and after independent investigation by higher supervision their recommendations have frequently been adopted by management. They are instructed to warn employees in their respective "lines" concerning improper dress and after consultation with their own supervisors are empowered to send such employees home. Their average hourly rate
14 of pay is approximately thirty cents more than the average of employees on the line, and like them they are paid overtime and punch clocks. Each of the line supervisors has a number of employees "working under them," which number varies from time to time, depending upon production conditions. Thus the line supervisors average the following number of employees working "under them":

Donna Bowmaster	10	Mona Hancock	25
Ida Bulman	14	Betty Henry	6
Paul Burget	5	Janet Mauk	25
Clara Davis	20	Mary Mauk	10
Mary DeLozier	15	Wayne Medesia	6
Catherine Fyan	10	Mary Price	10

It is conceded that they make recommendations for disciplinary action and that Respondent has "carried out these recommendations as seen fit." They are consulted when the salary increase of an individual employee is contemplated, make recommendations as to the workability of such employees, and participate in periodic employee rating programs. Management gives "quite a bit" of weight to such reports and recommendations.[3]

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[3] The foregoing findings are a composite of the testimony of Plant Manager and Vice President Francis R. Lockard, Personnel Director Robert M. Wallace and of Supervisor Dolores Mascitelli, a witness called by the

(Continued)

Appendix E

On August 8, 1966 Respondent and the Union agreed upon a list of employees eligible to vote in the forthcoming election, which list includes among those eligible to vote eleven of the twelve line supervisors, Betty Henry having been discharged in the meantime. And in this respect it is stipulated among the parties that as an element of the negotiations leading to the consent election it was agreed that at least nine named supervisors would be permitted to vote, thus explaining their presence on the eligibility list. They voted at the subsequent election and their votes were not challenged.

Respondent urges that despite its earlier willingness to concede the voting eligibility of the line supervisors, an action which it claims to have taken to expedite the preelection negotiations and preparations, it should not now, in contexts of a refusal to bargain and of a discharge of an alleged supervisor, be bound by its original acquiescence. Thus, despite its earlier concession to the contrary, it strenuously urges that the line supervisors whom it has agreed to include in the voting unit are, in fact, ineligible, being supervisors within the meaning of the Act, a status which would bear significance to issues pending herein.

It is well settled that agreements and concessions respecting inclusion or exclusion of a specific job categories or individuals made by the parties to expedite a representation proceeding do not carry with them the force of settled law. *Montgomery Ward & Co., Inc.*, 115 NLRB 645, 647;

(3 continued)
General Counsel. This testimony corroborates the several "reports of violation" signed by line supervisors and submitted to management and admitted into evidence. It also supports the testimony of Betty Henry and Mona Hancock called as witnesses by the General Counsel.

Cf. *Birmingham Fabricating Company*, 140 NLRB 640. Nor does failure to contest or to pursue all avenues of appeal in a representation proceeding preclude a party's efforts to relitigate the issue in a subsequent complaint proceeding where it arises in some other context. *N.L.R.B. v. Sagamore Shirt Co.*, 365 F.2d 898 (C.A., D.C.). I would accordingly reject any suggestion that I am precluded from determining the supervisory status of the line supervisors on the basis of the evidence presently before me.

A consideration of relevant evidence, particularly the testimony of Vice President Lockard and Personnel Director Wallace, discloses that in such areas as direction of employees, evaluation of their work, the reprimanding of them and making recommendations respecting their production, conduct and shortcomings, which recommendations are usually accepted by management upon review, the line supervisors responsibly direct the employees who "work under them."[4] I therefore conclude and find that Respondent's twelve line supervisors employed during June, 1966, and including Betty Henry, are supervisors within the meaning of Section 2(11) of the Act and may not be properly included in any bargaining unit which I find to be appropriate for collective bargaining purposes.

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C. *Interference, Restraint and Coercion*

1. The Company's stated opposition to Union organization

The Union's organizing activity first came to Respondent's attention on May 24 during the course of a supervisors'

[4] Betty Henry credibly testified that in cases of absence or emergency she frequently substituted for one or the other of the employees assigned to her. This activity on her part, regular though it may have been, in no way detracts from the inherent supervisory power which I find to exist in substantial measure. Ohio Power Co. v. N.L.R.B., 176 F.2d 385, 388 (C.A. 6).

meeting. On this occasion someone in the group showed Vice President Lockard a copy of a letter being sent to employees seeking their support. Lockard turned over the letter to President W. E. Boyer. After reading it Boyer directed his discussion to the need for loyalty among the supervisors and management and for "diligence in maintaining our status without the aid of a union." [5] Supervisor Bottenfield, called as a witness by Respondent, credibly described the meeting in some detail, quoting Boyer: "He looked on us as the supervisory personnel. That everybody that was present in that room at that particular time were the supervisors, the supervisory personnel. He depended on us. That he wanted us to be loyal to him. If we didn't feel that we could be loyal to him that we could leave the room if we did not and there would be no hard feelings whatsoever." (Tr. 863-4) Mrs. Bottenfield's
17 next comment in her testimony bears significance to the issues herein: "But needless to say nobody left the room."

In the course of his plea for cooperation President Boyer urged the supervisors to "talk company to the girls," and find out how things were going. And at a subsequent meeting index cards bearing the names, addresses and telephone numbers of the individual employees were distributed among the supervisors for the purpose of ascertaining who were for and who were against the Union. Each supervisor was asked to note on the card after discussions with individual employees whether they were for or against the Union or questionable. [6]

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[5] The testimony of Lockard and Boyer, corroborated by Supervisors Mascitelli, McIntire, Hancock and Henry, and Personnel Director Wallace.

[6] The testimony of Supervisors Mascitelli, and Hancock.

At one of the subsequent meetings of supervisors held in mid-July, according to Supervisor Hancock, they were asked (without identifying who it was that asked) if any of them had signed union cards and Hancock indicated that she had done so. She was complimented by Respondent's attorney for her frankness.

2. Pre-election incidents

Consistent with the policy disclosed at the several supervisory meetings management determined, in the words of Vice President Lockard, to embark upon a "Company selling campaign." This conduct is the subject matter of the Complaint issued against Respondent, specifically Paragraph 6. To the extent that orderly presentation permits, the manner in which Respondent implemented its campaign against the Union will be detailed herein in such fashion as will relate the facts in the order in which they appear in the several allegations of the complaint.

At a meeting of the employees held on June 9, within two weeks after first learning of the Union's campaign, 18 Executive Vice President R. J. Boyer announced that additional paid holidays were under consideration. Thereafter, on July 29, at the height of the election campaign, slips were placed in employees' pay envelopes advising them that three additional paid holidays would be granted. The Respondent insists this action was taken as a result of an improved financial position and the announcement itself states that it was 'promised you several months ago." But Vice President Lockard's testimony, corroborated by Employee De Leo, establishes June 9 as the date on which President W. E. Boyer announced the three additional paid holidays, and a stipulation of the parties con-

firms that on June 9 Boyer promised the employees "it would do everything it could for the employees after the fiscal year ended."

It was at this same June 9 employee meeting that Executive Vice President R. J Boyer announced an improvement of the vacation plan. Thus, effective with the July 1966 annual vacation period, two weeks of paid vacation would be given to employees of three or more years of service. In the past, employees, after their first year, received only one-week paid vacation, the two-week paid vacation not being granted them until the completion of five years of service.

As soon as Respondent became aware of the Union's efforts among its employees it developed its own program, as noted previously, to counter the activity by, as Vice President Lockard described it,[7] a program of "selling the Company," and by intensively ascertaining the sentiments of the employees. Although there is testimony that the term "union" was not used, that all management people were given a list of "do's and don'ts," and that they were instructed not to directly interrogate those employees with whom they spoke, there is considerable
19 corroborated and undenied evidence that management and its representatives exceeded these bounds.

In the course of reprimanding Employee Romeo DeBartolome, an employee active in the affairs of the Union, for soliciting on behalf of the Union President W. E. Boyer asked him, "What do you expect to get from the union?" Or, as Vice President Lockard described the incident, "W. E. Boyer asked DeBartolome why he was trying to bring in the union."[8]

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[7] Corroborated by the testimony of Supervisor Mascitelli.

[8] I rely upon Lockard's and DeBartolome's testimony in this respect and do not credit Boyer's denial that he asked the question attributed to him by DeBartolome. He was not questioned concerning Lockard's version.

Shortly thereafter DeBartolome encountered Vice President R. J. Boyer who also asked him why he wanted to get the Union into the Plant. When DeBartolome replied that the employees generally favored the Union Boyer replied, "You're not smart, you're dumb. Too dumb to work for me and some day I'm going to get you. He then asked DeBartolome, as had W. E. Boyer, what he expected to get from the Union. To this DeBartolome replied, "Hospitalization." Whereupon Boyer countered, "You'll never get free hospitalization from us."[9] R. J. Boyer is also described as having a similar conversation with Betty Henry, the line supervisor whose discharge will be considered in detail hereafter (*infra* p. 15). This conversation, in the privacy of Boyer's office and with no one else present, admittedly involved Henry's membership in the Union. According to Henry, whom I credit, Boyer asked her if she was on the Union committee, at the same time commenting upon certain employees, Kiesewetter, Terry, DeBartolome, and Hancock—all on the committee. He then told her he heard she had been holding union meetings; which she denied. He then asked her if she had signed a union card. And upon her admission that she had signed one he asked her why. Boyer, in the course of the conversation, reminded Miss Henry that she was a supervisor and working for the Company and he specifically inquired if she had been at the last supervisor's meeting; to which she replied that she was not, having been hospitalized at the time. Having found that Betty Henry is a supervisor within the meaning of the Act I am disposed to attach no more significance to her private conversation with R. J.

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[9] Executive Vice President R. J. Boyer admitted to this conversation with DeBartolome and to a question, "Why are you such a rabid unionite?" He denied the remainder of the statements attributed to him. Upon my observation of both witnesses I credit DeBartolome and reject Boyer's version of the conversation and his denials.

Boyer than to view it as background relating to her subsequent discharge and as a demonstration of the pattern of R. J. Boyer's predisposition towards the Union.

Supervisor Mascitelli, a witness for the General Counsel, credibly described the manner in which she carried out the instructions to "sell the Company";

> I went to each and every individual in my department, and I said to them, "The Company was good to them." I told them, "The Union represented an outside influence and if we had any problems the Company could solve them without any Union help."
> Q. Then what did you do?
> A. Well, by conversing with these girls I ascertained where they stood as to whether for, against, or questionable. (Tr. 216)

And, after testifying that she was not able to interview all of the 15 employees under her supervision, she described what next transpired:

> Then a short while later Mr. Patterson came to me and he asked me, "to put on a yellow intercom office paper sheet, to put on the names, make three columns, for, against, questionable." . . . So that is precisely what I did. Then after conversing with all of these people, each individual girl, I went to them and I told them, number one the Company was good for them. Number two, that we didn't need any outside influence. Number
> 21 three, that if we had a problem the Company was willing to meet with us and solve it. Those are the three things that I stated twenty-five times over. (Tr. 229-230)

In a number of recorded instances, however, the supervisors appeared to have extended their efforts. Thus,

Employee DeBartolome observed that "a lot of the management personnel, supervising personnel, would stop me in the process of my work and ask me about it, question me about it, ask me about the union activities." Specifically, DeBartolome described conversations with Traffic Manager James Reighard, a few weeks before the August 17 election. He quotes Reighard as saying, "The Union demands would be such that Boyer Bros. couldn't afford to meet their claims. If he was running the company he would close up the plant. Mr. Boyer probably would." DeBartolome further testified that "quite a few times" before the election Reighard asked him "if I changed my mind yet about the Union." (Tr. 51) [10]

A week before the election Supervisor David Hainly had a conversation with Employee Gary Neff. Hainly spoke to him in the lunchroom and asked him what he thought about the Union. He then went on to say that before he voted he should consider the reasons for a union and what it can do for him. [11] Previously Vice President Lockard had also sought out Neff, took him aside, and asked him if he had heard anything about the Union, and went on to discuss promotion possibilities, a subject to be discussed in detail hereafter (*infra* p. 9).

22 On the day of the election Al Bidoli, Respondent's general production foreman, approached Employee Janice Yarmish and asked her if she was going to vote in the election. When she told him that she was, he asked her, "How?" When Miss Yarmish inquired of him how he

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[10] I do not credit Reighard's denial that he had a conversation with DeBartolome concerning the Union during the period immediately prior to the election.

[11] I do not credit Hainly's denial that he questioned Neff or his testimony that the conversation was restricted only to his statement that he would not want the Union to represent him.

thought she should vote he replied by urging her to vote against the Union. [12]

In addition to the foregoing incidents which involved the conversations between supervisors and employees there are several additional conversations between Employee Sirley McCachren and President W. E. Boyer, Executive Vice President R. J. Boyer, and Vice Presidents Lockard and Melvin Barr. Because all of these incidents hinge upon the testimony of Miss McCachren I am not disposed to make any finding with respect to them. I observed Miss McCachren as a witness and upon her demeanor I do not accept her testimony as credible. Illustrative of this is the manner in which she testified, halting and confused in her presentation of accounts of what supposedly had transpired. Furthermore, when confronted at one point with a statement she had previously made in her pretrial affidavit she appeared to be unable or unwilling to distinguish between her own current sworn testimony and a contradictory statement appearing in the affidavit itself. [13]

In addition to the foregoing findings which relate, for the most part, to conversations between management and
23 employees there are other incidents which reflect a more positive effort by Respondent to forestall the Union.

Employee DeBartolome, as we have seen, was known to have been the most active union advocate among the employees, was frequently questioned concerning these

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12 Called to testify Bidoli could not recall such a conversation. I credit Miss YarMish's account of the incident.

13 Having rejected Miss McCachren as a credible witness I would accordingly dismiss for want of credible support Paragraphs 6(h), (i), (w), (a) and (aa) in the Complaint which rely for proof solely upon her testimony. Nor do I consider for any purpose such testimony as has been proffered either in support of or in rebuttal to Miss McCachren's testimony.

activities (*supra*), and was eventually reprimanded for carrying them on in the shop (*infra*). He credibly testified that quite apart from the constant inquiries from his superiors, and in line with Vice President R. J. Boyer's threat to "get him" (*supra*, p. 7), he has been "under the gun," as Vice President Lockard threatened he would be (*infra*). Thus, since the campaign began he has received five or six reprimands, one of them involving a one-day suspension for failure to wear a hat in the production area. This, it would seem, might have been routine and proper except that the unidentified superior who reported him for his transgression was himself not wearing a hat. Although his pay has not been reduced since Boyer threatened to "get" him he has been doing what he refers to as "a lesser job." Although classified as a mechanic and doing mechanic's work at the outset of the Union campaign DeBartolome testified without contradiction that since then his job is different. Thus

> It is a general maintenance job. Sometimes I work outside. Lately I have been working in their parking lot throwing gravel. I've dug ditches and filled them back up again. I repaired fence that didn't even belong to Boyer. Oh, I don't know, I could probably go on for hours. I painted the fence in freezing weather when the brush was so frozen you couldn't even get the paint on the fence.
>
> Q. These jobs that you had done, prior to the organizational drive have you ever done these jobs prior?
>
> A. No, sir. Nothing like that. (Tr. 73)

Employee Garry Neff's encounter with management was of a different character. Two weeks before the election, 24 in the campaign that he "launched to try to discourage the situation" Lockard "came across Mr. Neff." As he described it:

I asked him the question, "How long he was there?" He admitted three years. I said, "I couldn't understand why he hadn't been considered for supervisory work but that I would find out." I had some idea, although I had some small inkling of his problem, I wanted to make sure of it. I had asked him, "If he was interested in that way of bettering himself?" He said, "He did not know." I said, "Well, maybe you might change your mind and decide the other way. In the meantime I will check out your record by your superiors." I did just that and reported back to him, "His attitude was negative. That we would not consider the supervisory at all." (Tr. 323)

Neff's account of the incident conforms with Lockard's in substantial part, accepting only that Neff testified that in the course of the conversation he inquired about wage raise possibilities and that it was this which prompted Lockard to seek him out later to tell him that upon further check he found his attitude poor and urged an improvement. I do not view this variation as detracting from the conceded fact that at the height of the election campaign Lockard sought out Neff and made the promotion overtures described above.

3. Post-election Incidents

After the August 17 election in which the employees rejected the Union several additional incidents occurred which bear relevance to Respondent's efforts to defeat the Union. The first incident, involving President W. E. Boyer, demonstrates Respondent's effort to convey to the employees its awareness of who were the ones who favored the Union. Boyer, on a visit to the Peanut Butter Department, summoned Employee Garry Neff and accused him

of spreading a rumor that there were mice in the peanut bags.[14] Neff appears to have corrected Boyer's misunderstanding and Boyer went on to say that if he (Neff) "and 94 others would have voted the other way it would have been a different story." Although the import of this remark has a rather dubious relation to the mouse rumor, crediting Neff as I do, it does suggest, and I find, that Boyer was aware that Neff was a Union advocate and that he wanted Neff to know of this awareness.

Again, approximately a week after the election, the employees in the Peanut Butter Department were severely reprimanded by Vice President Lockard. The basis for the reprimand was the failure of the responsible employees—Gary Neff, Albert Erculiani, Frank Pollito and Clair Cherry—to add cocoa butter to the peanut butter in the formula preparation of seven batches of candy filling. The consequence of this failure, according to Lockard whom I credit, was the loss of 4200 pounds of peanut butter. It appears from the testimony of the employees questioned—Cherry and Neff—that there was no excuse for the lapse, that it was a costly one, and that some reprimand would normally be expected.[15] A meeting was promptly arranged and a severe reprimand was given the employees responsible for the error. Present were Lockard, President Boyer, Personnel Director Wallace, and Production Foreman Bidoli. Lockard advised the men of the gravity of their error and told them that they could be fired for what they had done. In conclusion Lockard said that if the "chewing" got outside the door

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[14] There is no evidence in the record of any condition of mice infestation in the Respondent's plant.

[15] I attach no mitigating significance to the fact that the Peanut Butter Department was then unsupervised or that the conduct might have been a consequence of laxity on Respondent's part.

neither the National Labor Relations Board or the Union
26 could help them. And President Boyer added that if they got fired Mastandra and Micelli, the Union representatives, could not do anything to help them. There is no evidence, however, that they had been threatened with discharge if they were to report the reprimand to either the Board or the Union.[16]

4. Other alleged instances of interference, restraint and coercion

Two additional incidents occurred that are the subject of the complaint, both during the pre-election period; the reprimand of Employee DeBartolome (Par. 6(j) and (bb)), and the allegedly coercive conversation between Personnel Director Wallace and Employees DeLeo and Sandra Neff (Par. 6(g)).

a. *Union solicitation in the plant*

On July 22 Romeo DeBartolome, then a mechanic, reported to work at 6:30 a.m., as was his custom, so that the machinery would be in proper condition for operation on the shift which began at 7 a.m. At approximately 6:40 a.m. DeBartolome was preparing machinery for use and as he did so, according to his credited account, he spoke to several men working on the third shift, "pointing out their discrepancies." Third shift Foreman Vincent Gaeto appeared on the scene and asked DeBartolome why he was talking to the men. In reply DeBartolome stated, "We were having a union meeting."

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[16] The credited testimony of Neff, corroborated by Cherry. In Lockard's version, which I also deem to be corroborative, they were told that recourse to the Board or the Union would not help themwhen they were wrong, as they were in this instance.

Although DeBartolome testified that his reply to Gaeto was made "jokingly," he conceded on cross-examination that he gave no indication to Gaeto that it was in jest. Gaeto's version differs little from DeBartolome's, except that Gaeto quotes himself as asking, "What is this, a
27 union meeting?" To which DeBartolome replied, "Yes, it is." This variance is not significant. What is significant is whether Gaeto really believed DeBartolome to be engaged in union activity or to be merely joking. Gaeto's further testimony supplies the key to this for he testified credibly that it was his best judgment at that time that DeBartolome was serious, thus confirming DeBartolome's testimony that he gave no indication that his reply was made "jokingly." Upon the foregoing I conclude and find, therefore, that when Gaeto thereafter reported DeBartolome's conduct to his superiors he did so upon the assumption that DeBartolome had truthfully and seriously admitted to talking to the third shift employees about the Union during his and their working hours, his shift having begun at 6:30 a.m.

Upon Gaeto's report of DeBartolome's action he was summoned to the office later in the day and reprimanded by Lockard in the presence of a number of other top members of management. Lockard referred to provisions in the Employee Handbook forbidding soliciting and told him that for such an offense he could be fired. He was told that in the future he was not to talk about the Union *at any time*, "my time or Company time." He was also told that he was "under the gun" and if he made any mistakes he would find himself in the street. Later in the day DeBartolome was presented with an official reprimand which stated that it was for "soliciting support for an outside organization during working hours." [17]

[17] The foregoing findings are a synthesis of the testimony of DeBartolome, Vice President Lockard, and Supervisor Gaeto, all of whom appeared to be

(continued)

Appendix E

28 The provision of the Employee Handbook which forms the basis for the reprimands stated as follows:

> ARTICLE #20— *UNAUTHORIZED SOLICITING OR GAMBLING*
>
> Vending, soliciting, or collecting contributions for any purpose whatsoever on the premises of this company *unless authorized by the Management*, will result in: 1st OFFENSE—Suspension - three (3) working days with loss of pay for that period. 2nd OFFENSE—DISCHARGE.

b. *The threat to withdraw friendship*

Next we will consider the conversation had between Personnel Director Wallace and Employees Eileen DeLeo and Sandra Neff which has been alleged to be coercive. Two weeks before the election, on the occasion of a visit to the office during the vacation period, on July 14, Employee DeLeo and Neff met Wallace with whom they were both acquainted. In the course of a conversation which followed Wallace told them that if he found out that they had anything to do with the Union that would be the end of their friendship.[18] Mrs. DeLeo testified that upon meet-

([17] continued)
in substantial accord, with one major exception. Lockard denies that he told DeBartolome at the meeting that he might not solicit on his own time, as testified to by DeBartolome. Under all the circumstances, including the gravity which management attached to the offense by calling a full-dress reprimand meeting, I am disposed to accept DeBartolome's version and view Lockard's statement as one which included non-working time as well as company time. In thus rejecting Lockard's version I note that except in this one statement, "company time" was the criteria in all other references to this incident and to the offense.

[18] In his brief to me counsel for the General Counsel attaches significance to the fact that Wallace "also adverted to the discharge of Betty Henry" (infra, p. 15), suggesting that by including this in the conversation the "friendship" reference became an implied threat. Mrs. DeLeo did mention the Betty Henry discharge in her testimony, but only to fix the time of her conversa-
(continued)

ing Wallace at the plant two weeks later he repeated the remark. I do not credit Wallace's denial that he made the statement on either occasion.

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5. Conclusions

A review of the findings set forth above disclose a definite pattern of action on Respondent's part to thwart the Union's organizing efforts. Indeed Respondent would be the first to concede such activity, and has based its defense in this proceeding upon the proposition that the steps it took were a proper exercise of its rights under the Act. In such a posture, therefore, evaluating the conduct is a matter of prime concern, to determine if there inhers in it unlawful interference, restraint and coercion.

a. *The additional paid holidays and the improved vacation plan*

On June 9, sixteen days after Respondent's first knowledge of the Union's campaign, announcement was made to the employees through their supervisors (*supra*, p. 6) that three paid holidays would be added to those then being given, and that substantial improvements would be made in the vacation plan. The timing of such benefits with the Union's campaign cannot be viewed as mere coincidence, nor has the Board ever so viewed such benefits.[19] Particularly in the light of Respondent's vigorous efforts

([18] continued)
tion with Wallace. Thus on cross-examination she simply stated that she knew the conversation occurred on July 14, because it was the same date as Henry's discharge, and she knew this "because he (Wallace)mentioned it." As I observed her as she testified I do not judger her statement on the "friendship" matter to have been consciously related to the Henry discharge and I reject any suggestion that it was.

[19] Ivy Hill Lithograph Company, 121 NLRB 831, 850.

to defeat the Union I conclude and find that granting are additional paid holidays and instituting a new vacation plan when it did could not but effect the sentiments of the employees in the heated atmosphere generated by the Union campaign and by the Company's resistance movement. I therefore conclude and find that these actions constitute unlawful interference, restraint and coercion.

b. *The reprimand of DeBartolome and the no-solicitation rule*

I am satisfied that when Supervisor Gaeto reported DeBartolome for engaging in Union business on Company time (*supra*, p. 11) he was accepting DeBartolome's statement that it was such and not that he was joking. Moreover there is nothing in the record to suggest that management did not take disciplinary action with this same understanding.

DeBartolome was reprimanded for engaging in solicitation in behalf of the Union on company time. But an employer may make and enforce a rule forbidding his employees to engage in such solicitation during working time.[20] I would accordingly find Lockard's reprimand a proper exercise of his managerial authority.

But it must be remembered, however, that DeBartolome was not only reprimanded for his conduct but he was also warned as to future transgressions—that he was not to talk about the Union at any time. Thus there is a second element which we must consider here. I am not so favorably disposed to Lockard's further remarks to DeBartolome —that he was not to talk Union *at any time*. This statement partakes of the same vice as does the published rule

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[20] Peyton Packing Co. Inc., 49 NLRB 828, 843-844.

upon which Lockard appears to have relied (*supra*, p. 12). Thus Respondent's employees are enjoined by the Employee's Handbook from soliciting, not merely during their working time, but "on the premises of this Company"; that is to say, at any time. It is well settled that such restrictions upon the employees "during their non-working time unlawfully interferes with their right to discuss self-organization among themselves, unless the employer proves special circumstances that make such a restriction necessary to maintain production or discipline."[21] As no such circumstances have been presented here I would conclude and find that the published rule which so restricts the em-
31 ployees, together with Vice President Lockard's application of this rule in his statement to DeBartolome, each constitute the unlawful interference, restraint and coercion implicit in the applicable decisions of the courts and the Board.

c. *Threats and promises*

An employer's right to engage in speech or conversation in opposition to a union does not extend to actual or implied promises of benefit or to threats. This is implicit in Section 8(c) of the Act. Against such a backdrop President Boyer's statement that he would "get" Employee DeBartolome (*supra*, p. 7), the known Union leader among the employees, followed by such incidents as the frequent questioning of him (*supra*, p. 7), giving him five or six different reprimands, one reprimand for the failure to wear a hat given him by a hatless supervisor (*supra*, p. 9), and his assignment to arduous tasks (*supra*, p. 9) all assume a significance far beyond casual conversation or

[21] N.L.R.B. v. Walton Manufacturing Co., 289 F.2d 177, 180 (C.A. 5); Stoddard-Quirk Manufacturing Co., 138 NLRB 615.

persuasion. I would, on the contrary, conclude and find that Boyer's threat to "get" DeBartolome, effective as it happened to be, constituted interference, restraint and coercion in violation of the Act. Nor is Boyer's statement to DeBartolome immediately thereafter any less unlawful. Thus when Boyer told DeBartolome that the employees would "never get free hospitalization from us" he thereby demonstrated a mind closed to collective bargaining upon a mandatory bargaining subject and this presents a further incident which I also find to be interference, restraint and coercion.[22]

Similarly, the statement of Traffic Manager Reighard to DeBartolome during the height of the campaign that "Mr. Boyer probably would" close up the plant if the Union won is the sort of statement consistently construed to be
32 unlawful interference, restraint and coercion[23] and I so conclude and find here.

And equally coercive is the promotion overtures made to Employee Gary Neff when, at the height of the campaign, Vice President Lockard sought him out and in the context of questioning him concerning his union preferences, discussed in detail the possibilities of promotion. Citation of authority is certainly not necessary to establish that conduct of this sort can be viewed only as an inducement to side with the Company against the Union. As such I find and conclude these overtures to be another instance of unlawful interference, restraint and coercion.

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[22] The Rose Company, 154 NLRB 228, 268.

[23] Baltimore Binding and Waistband Corp., 130 NLRB 1629; Lock Joint Tube Co., 127 NLRB 1146.

Appendix E

d. *Interrogation, surveillance, and the impressions of surveillance*

The record and the findings set forth above are replete with conversations which to a greater or lesser degree contain the ingredients of questioning, and a general inquisitiveness by management into matters that are none of its business—namely, the individual employee's respective feelings, attitudes and preferences as to their bargaining representative. It is clear from all that transpired during the pre-election period that a fine line was established earlier as a matter of Company policy; one beyond which Respondent sought not to tread in prying into their employees' personal affairs, and in communicating to them the Company's preference not to deal with the Union as their bargaining representative. While I am constrained to respect the letter and spirit of Section 8(c) of the Act which bestows free speech in this area upon an employer, I know of no restrictions which prevent me drawing from obvious facts the deductions and inferences recognizable to anyone of normal intelligence. What
33 Respondent was determined to do here was to convey to its employees its distaste for the Union and to glean from conversations with them a knowledge of where each one stood in the matter. This is obvious from a reading of the findings detailed above (*supra*, pp. 6-9). Under such circumstances I fail to see how analysis of reported incidents and citation of relevant cases would add anything to what must appear obvious even to the naive. So, whether employees were questioned or just "talked to," the goal was the same—were they for or against the Union? Further, whether supervisors were told to talk and not to question presents more semantics than legal distinction. For whether the supervisors "interrogated" or "created the impression of surveillance" matters little—the end

result is the same. Accordingly, upon the questions propounded, the surveillance suggested and executed, and the listings made and reported by supervisors, all of which have been detailed heretofore, I would conclude and find that the Respondent, by the activities of the top officials of the Company, W E. and R. J. Boyer, Lockard and Wallace, and by its minor officials and supervisors Hainy, Bikoli, Mascetelli, and the other supervisors, including line-supervisors who carried out the stated instructions, effectively interfered with, restrained and coerced the employees during the critical period when they were about to select their bargaining representative.

Nor is it significant that the statements made by members of the latter group were made without the knowledge of, or indeed contrary to the instructions of management or its attorney, none of whom thereafter disavowed such statements.[24] The real vice is that employees subject to the pressures of a supervisor's remarks, be they ques-
34 tions or threats, have every reason to assume that these same supervisors are speaking for the management of which they are a part. By the conduct set forth above therefore I conclude and find that Respondent further violated Section 8(a)(1) of the Act.

e. *The 'friendship' threat*

One further incident remains for consideration — Personnel Director Wallace's statement to Employees DeLeo and Sandra Neff (*supra*, p. 12) to the effect that if he learned of their membership in the Union it would be the end of their friendship. In his brief to me counsel for the General Counsel argues that this statement was an

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[24] Birmingham Publishing Co., 118 NLRB 1380; Birmingham Fabricating Co., 140 NLRB 640.

implied threat of discharge as well as a threat to withdraw friendship because it was made in the context of reference to Betty Henry's discharge (*infra*). As I have previously found, Henry's discharge was "mentioned," it is true, at the time, says DeLeo; and DeLeo herself mentioned it in her own testimony; but only to fix the time of the incident. I am not disposed to let this passing reference be inflated to a full-blown event and to thus manufacture a threat that does not otherwise appear. On the contrary, upon my analysis of DeLeo's testimony and observing her as a witness I reject any suggestion that she was, or felt she was being threatened with the same fate as Henry.

Now we are left simply with Wallace's threat, so-called, to withdraw his friendship. There is no evidence that this was a friendship of the deep and abiding sort, or that it was of long standing. On the contrary the record leaves me with the distinct impression that Wallace, obviously a friendly person to begin with, was friendly with the employees as might be expected of him in his official capacity. I am directed to no authority for the proposition that this characteristic of "friendliness" is a commodity of substantial value to be given or withheld in the give and take
35 of a Union organizing campaign. I am referred to *Smith Broadcasting Co.*, 146 NLRB 752, 762, where the Board sustained the Trial Examiner's finding that a supervisor's withdrawal of friendship because of an employee's union sympathies was a violation of the Act. But a reading of that case discloses that the friendship there was a very close one, the supervisor being "one of the best friends the employee ever had" giving the appearance of a relationship of more importance than holding a job. In fairness to the individuals concerned here, on the other hand, it must be emphasized that there is no comparison whatever between the cited factual situation and the casual

remarks found to have been made here. I would accordingly dismiss so much of the complaint as alleges a violation of Section 8(a)(1) by Personnel Manager Wallace.

D. *The Discharge of Betty Henry*

Betty Henry was employed by Respondent as a line-supervisor, a work category which I have found to be supervisory within the meaning of the Act (*supra*, p. 5). In this capacity she was required to attend supervisory meetings, including a number of the specific meetings discussed above, and to perform the functions of line-supervisors already discussed in detail above. Albeit the section she supervised operated on a seasonal basis and Henry herself worked along with those whom she supervised the status of her position is in no wise altered. It is, as we have previously noted, the power and authority which inhers in the position and not the frequency of intensity with which it is exercised or applied.[25] I therefore reaffirm my previous conclusion that the specific line supervisor, Betty Henry, was a supervisor within the meaning of the Act.

36 A review of the findings heretofore made and of the substantially mutually corroborative testimony of Henry and Vice President Lockard disclose that Miss Henry was most active in her support of the Union and that this became known to management officials. Such was the situation on July 13 when R. J. Boyer confronted her with his knowledge that she was actively working for the Union. This she admitted to him. Whereupon he reminded her that she was a supervisor and was expected to work for the Company. On the following day Vice President Lockard

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[25] Ohio Power Co. v. N.L.R.B., 176 F.2d 385, 388 (C.A. 6).

called Miss Henry to his office and after a few preliminary remarks told her that she was being discharged. When Henry asked the reason he replied, "Incompetent and insubordinate." Lockard confirmed this in his testimony, stating further that the insubordination was based in part upon Henry's union activity. In its brief to me Respondent concedes that there was no reason for Miss Henry's discharge other than participation in the Union's organizing activities.

"Absent special circumstances, a statutory supervisor does not enjoy a protected right to engage in concerted activity in behalf of a labor organization."[26] Such "circumstances" have been described as instances where supervisors had failed or refused to commit an unfair labor practice against rank-and-file employees and had been discharge in consequence.[27]

Betty Henry, a statutory supervisor, was not shown to have been required to do anything except to carry out instructions relating to her part in the Company's campaign. Nor is it claimed that she was discharged for any lapse in this area. In a word, there were no special circum-
37 stances surrounding her discharge. Indeed I would conclude and find that she was discharged for doing what all agreed she was discharged for doing—engaging in union activities. In the absence, therefore, of any of the special circumstances referred to above Henry, as a statutory supervisor has no protected right to engage in the union activities as she did. I would accordingly conclude and find that her discharge for this specific reason was not a violation of either Section 8(a)(1) or (3) of the Act and I

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[26] National Freight, Inc., 154 NLRB 621, 622.

[27] Talladega Cotton Factory, Inc., 106 NLRB 296, enfd. 213 F.2d 209 (C.A. 5); Ozark Motor Lines, 164 NLRB No. 41.

would recommend that so much of the complaint as alleges that it does be dismissed.

E. *The Refusal to Bargain*

It is General Counsel's contention that the Union, upon its request to bargain (*supra*, pp. 2-3), already represented a majority of the employees in the bargaining unit agreed upon by the parties prior to the August 17 election (*supra*, p. 31). This, it is claimed, can be established by the signed union authorization cards upon which the majority was first asserted. Accordingly, it is contended, because the Respondent's subsequent doubt to this claim to majority was not made in good faith, as indicated by subsequent unlawful conduct, and because the conduct was calculated to destroy the Union's established majority, the Respondent thereby refused to bargain with the Union in good faith.

Respondent, on the other hand, claims that the bargaining unit in which the Union's majority is claimed is not an appropriate one regardless of an agreement to accept it as such in the earlier representation proceeding. Additionally Respondent has registered a number of objections to the use of signed authorization cards which includes the eligibility of some of the employees for whom cards were presented and the manner in which the authorizations were procured. Because the definition of the unit appropriate for bargaining and the establishment of this majority
38 claimed by the Union are essential to any findings of a refusal to bargain an analysis of these issues becomes the first order of business.

1. The appropriate unit

Elsewhere herein I have concluded and found that the position of line-supervisors, as described in the credible

testimony, is supervisory within the meaning of Section 2(11) of the Act, for it is abundantly clear that those who hold the position responsibly direct employees assigned to them and that in the exercise of their authority they are required to use their independent judgment. I would accordingly conclude and find, that irrespective of any agreement or arrangement to the contrary[28] the unit of employees appropriate for the purposes of bargaining is:

> All production and maintenance employees, truckdrivers and shipping and receiving employees, at the Employer's Altoona, Pa. plant; excluding all other employees, office clerical employees, guards, professional employees, line supervisors and all other supervisors as defined in the Act.

2. The critical date

Critical to a determination of the request to bargain and the refusal is a determination of the date upon which the claim was established. It was on July 6, 1966 the Union made its demand upon Respondent for recognition and bargaining upon a claim of majority status. I conclude and find that as of this date, July 6, that it must be established that the Union represented a majority of the eligible employees in the unit which I have found to be appropriate.

3. The total eligible employees

Preliminary to the trial of this matter a list of employees was prepared and agreed upon. It was stipulated that 39

[28] In a previous section of this Decision I have concluded that Board precedent does not require adherence to stipulations or agreements in the representation case which are contrary to existing fact, statutory enactments or settled law. Supra, p. 5.

on various dates during the period between June 28 and July 17, 1966, 223 listed individuals were employed. Specifically it was stipulated that on July 6, 1966, the date of the Union's claim to majority status, 220 were employed. This total included Patricia Tresise and Philip Jenkins of whom it is found by stipulation and credited testimony, respectively, that they were actually in Respondent's employ on July 6. The total does not include the names of Mary Blake Weltmer or Mary Butler, neither of whom were employed *after* June 30.[29]

Twelve names on the list were those of the line supervisors whom I had previously listed by name as being statutory supervisors (*supra*, p. 5). I conclude and find that they are not a part of the bargaining unit and that the total of the unit be reduced accordingly; and I direct that their union authorization cards, if any there be, not be counted for purposes of determining majority status.

Over General Counsel's objection Respondent contends that six employees were eligible members of the bargaining unit although in layoff status during all or part of the June 28-July 17 payroll period. Their names appeared on the list as being of questionable status. These were *Jean Huntsman*, *Carole Marlett*, *Mary Mobley*, *Donna Quarry*, *Ruby Robertson* and *Carol Smith*. In support of its argument to include them Respondent submitted a list of all employees who were in lay-off status during the week ending July 10, the week during which Respondent refused to bargain. Fourteen employees were listed as being in layoff status, the six in question and seven others who voted in the subsequent election and whose eligibility

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[29] These four names are specifically referred to at this point for the reason that each signed a union authorization card which would or would not be counted depending upon the employment status of the signer as of July 6, 1966.

status, generally, is unchallenged. One additional name
40 on the list was Janet Mauk whom I have previously found to be a supervisor (*supra*, p. 5).

Upon full consideration of this lay-off list, containing as it does the recent employment history of each employee involved, and upon the testimony of Personnel Director Wallace and Employee Jean Huntsman whose employment history I consider typical of those in layoff status, I am persuaded that in each case, including the cases of the six employees in question, there was as of July 6, 1966, a reasonable expectancy of their return to work in the future. Thus each had been laid off and recalled at least once prior to the date in question and all have been recalled since that date. Indeed the six employees in question appear to be in a different category from the other seven in layoff status *only* because their return from layoff status was too late for them to be included among those on a subsequent (July 22) eligibility list for the up-coming election. In all other respects their eligibility is as unquestioned as the seven who actually voted.

It is not my province to determine who was eligible to vote in the election. On the contrary, I am required to determine upon the facts presented me who, as a matter of law, were employees in the appropriate unit on July 6, the date of the Union's demand for recognition. This was two weeks *before* any election or election eligibility was ever agreed upon. In this respect, then, I am satisfied that regardless of the precise day upon which they shortly thereafter returned to work, all six were employees with a reasonable expectancy of future continuing employment on July 6. I would accordingly conclude and find that all six, *Jean Huntsman*, *Carole Marlett*, *Mary Mobley*, *Donna*

Quarry, *Ruby Robertson* and *Carol Smith* were properly part of the total bargaining unit when a request to bargain was made.[30]

41 By way of recapitulation the 12 line supervisors should not be included in the bargaining unit. Accordingly, the gross total of the unit, as of July 6, would be reduced from 220 to 208. As I would retain on the list the names of the six employees on lay-off status, and the names of Tresise and Jenkins, the total of 208 would constitute the one upon which majority status would be determined. Accordingly, to demonstrate its numerical majority on the date upon which it requested collective bargaining, July 6, the Union must establish that it had been designated by 105 or more employees then in the unit.

4. The signed authorization cards

During the course of its organizing campaign the Union solicited signatures of the employees on cards which bore the following inscription:

AUTHORIZATION FOR REPRESENTATION

	I, the undersigned _____ (Please Print Name)	CONFIDENTIAL AUTHORIZATION CARD

_____
Address

_____
City Zone Home Phone Type of work

Employed by _____
Company name Shift

[30] Snap-out Binding and Folding, Inc., 160 NLRB No. 6.

Appendix E

I hereby apply for membership in the Bakery and Confectionery Workers International Union of America, Local No. ....., and I authorize and designate that Union to represent me for collective bargaining with my employer.

Signed _____
Please write Date

ALL CARDS ARE KEPT CONFIDENTIAL BY B&C
and the UNITED STATES GOVERNMENT

42 a. *Eligible employees who had read and signed the Union's authorization card*

Cards, to the total of 71 were signed prior to July 6, 1967, the date of the Union's request for recognition, by employees in the bargaining unit who credibly attested to their own signatures, the date on which they signed the card, and that they had read the card before signing it.[31] These cards were signed by the following:

Patricia A. Tresise	Cathy Wasylik (Fetterman)
Romeo J. DeBartolome, Jr.	Glenn A. Himes
Eileen DeLeo	Margaret Igou

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[31] Consistent with the discretion vested in me by the Board the witnesses called by the General Counsel were cross-examined fully on voir dire, with my permission, as to the circumstances under which they signed the authorization cards. Bryant ChuckingGrinder Company, 160 NLRB No. 125.

In the course of the cross-examination of employees testifying to the signing of cards I permitted counsel for the Respondent, over General Counsel's objection, to examine the respective witnesses as to their subjective understanding and intent in signing the card. At the close of the trial counsel renewed its objection to this line of questioning and moved to strike the testimony. I reserved ruling.

Upon a study of the record and relevant authority I have reconsidered my earlier rulings in this area and at this time sustain counsel for the General Counsel's objection to questions relating to a card signer's subjective intent and grant his motion to strike such testimony in answer thereto. Aero Corporation, 149 NLRB 1283, 1290. I accordingly do not consider any of such testimony in the conclusions which I reach herein.

Shirley M McCachren
Sandra Neff
Gary L. Neff
Saundra Brumbaugh
Mildred Metzgar
Virginia Glacken
Kathryn E. Stewart
Joan Diehl (Stock)
Linda Dickson (Schilling)
Jean Graffius
Sandy Kiesewetter
Doris Lindemer
William P. Harlow
43 Jean Fanella
Carol Burkhart (Farber)
Barbara Bailor
Gary D. Himes
Faye L. Imler
Joan Partner (Lonesky)
Judith A. Terry
D. E MacDonald
Frank R. Weidlich
Donald L. Brooks
Robert M. Byrnes
James Robinson, Jr.
Roy R. Litzinger
William F. George
Ronald Biem
Norma J. Hunt
Rose M. Troutman
Lois Decker
Cecilia Cooper
Walter L. King

Nancy M. Smith (Detwiler)
Gary T. Cockburn
Anna N. Brunner
Helen J. Martin
M. A. Manocchio
Barbara McPhee
Michael I. Montgomery
Betty H. Beaver
Gerald J. Jenninger
Mary E. Smith
Vicki Burk (Teegardin)
Jean Spahn
Gary McCormick
Donald O'Brien
Rhonda R. Pulcinello
Sandra L. Lebo
Dennis Appleman
Sandra J. Price
Dona J. Riggleman
Paul L. Rider, Jr.
Janet Siters
Karen A. Reeseman
Edward G. Lee
Phillip B. Jenkins
Betty L. Miller
Rita Brothers
Sandra Eversole
Genevieve Brubaker
Clair L. Cherry
Phyllis M. Smouse
Pual E. Runk
Margaret L. Ebling

Appendix E

B. Card signers who were aware of the Union campaign

In addition, prior to July 6, cards were signed by ten employees, all of whom attested to their signatures and the dates upon which they signed the respective cards. The record is silent, however as to whether or not they read the card prior to signing. These were the following:

Dorothy Crider	Jean Lear
Harry Martin	Benjamin Forshey
Jerry Corles	Christine Raia
Jean Huntsman	David Halton
Mary Lou Eckenrode	Dorothy Stewart

In each case the circumstances surrounding the signing are such, however, as to persuade me that the employee was fully aware that he was selecting the Union to represent him, as stated on the card which he signed. Thus Employee *Crider* credibly testified that she discussed the card with her husband before signing it and it appeared from the testimony of Employee Manocchio that Mrs. Crider was actively engaged in soliciting signatures of employees.

44 Employee *Eckenrode* credibly testified that she discussed the authorization card with her mother before signing it. Indeed the whole tenor of her testimony indicates that she was quite aware of the nature of the card.

Employee *Raia*, who testified that she had not read the card, credibly explained that she did not have to read it, being familiar with union authorization cards from previous employment.

Employee *Halton* credibly testified that he was given a card after being asked "if I wanted the Union in."

Employee *Martin*, in describing the circumstances of his signing of the card, quoted the Union solicitators as telling him they wanted him to sign the card "to get the Union in."

Employee *Corles* testified that he signed the card to have the Union represent him.

Employee *Forshey* credibly described conversations with fellow employees, many of whom he solicited for signatures, where the prime interest was "to be represented by a union."

Employee *Dorothy Stewart* was aware of the campaign "to have a union represent us" when she signed her card.

And Employee *Huntsman* received her card in the mail while she was in lay-off status and before she signed and returned her card she telephoned a number of her friends "to find out if they were being signed." It may readily be presumed that she had read the card about which she had made such a deliberate inquiry.

45 The employees listed in the two foregoing categories, all members of the bargaining unit, having read the printed materials on the cards which they signed or being otherwise aware that the card they signed was "for the Union," have established to my satisfaction by the cards which they signed and which came into the Union's possession prior to July 6, that they have each selected the Union as their bargaining representative as of that date, and I so conclude and find.

Nor is it significant that upon cross-examination in some instances the card signer may have indicated that obtaining an election was of prime consideration.[32] "The wording

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[32] See fn. 31 in which I have ruled that I am not relying upon testimony which relates to a card signer's subjective understanding or intent.

of the authorization card is an important factor in determining whether an employee meant to authorize the Union as his bargaining agent. Where a card is clear on its face, as designating the Union as his bargaining agent, it is not subject to parole impeachment merely because the employee was told that the purpose of the card was to secure an election. The card itself effectively advises the employee of the purpose to constitute the Union as bargaining agent." [33]

c. *Card signers unavailable to testify*

Cards were proffered at the trial signed by employees in June and early July 1966 but who have since that time left Respondent's employ and who for a variety of reasons were not available to testify with respect to the circumstances surrounding the signing of their respective cards. Although Respondent concedes the authenticity of the signatures on each of the proffered cards it objected to their introduction because of its lack of opportunity to establish
46 the cards' validity. In this respect it is to be noted that when cards were received by the Union their receipt was recorded upon a master check list of the employees which it maintained during the organizing campaign, as thereafter discussed in the case of Gary Runk's missing card. An inspection of this check list as it appears in the record reveals that all of the contested cards discussed hereafter were recorded as having been received by the Union during the campaign, i.e. prior to the Union's request for recognition. A consideration of the individual cards follow:

Joseph W. Tierney signed his card on June 9, 1966, was employed on July 6, 1966, and was not available to testify

[33] N.L.R.B. v. Sagamore Shirt Company, 365 F.2d 898, 906 (C.A., D.C.). See Also Brandenburg Telephone Company, 164 NLRB No. 26.

by reason of service in the United States Army, stationed at Fort Gordon, Georgia.

David T. Rossback signed his card on June 10, 1966, was employed on July 6, 1966, and was not available to testify by reason of being presently a member of the United States Armed Forces serving in Viet Nam.

Mary Anna Krywokulski signed her card on June 10, 1966, was employed on July 6, 1966, and was unavailable to testify by reason of her present attendance at college in Lockhaven, Pennsylvania.

Sandra Nedimyer signed her card on June 10, 1966, was employed on July 6, 1966, and was unavailable to testify, having moved from the area and presently residing in Asbury Park, New Jersey.

Patricia A. Eger signed her card on June 23, 1966, was employed on July 6, 1966, and was unavailable to testify by reason of personal incapacity which made her attendance impossible.

Cloyd A. Davis, Jr. signed his card on June 10, 1966, was employed on July 6, 1966, and was unavailable to testify by reason of service in the United States Army, stationed in Germany.

47 *Rose Duscanio* signed her card on June 13, 1966, was employed on July 6, 1966, and was unavailable to testify, having moved from the area and presently residing in San Diego, California.

James Crist signed his card on June 13, 1966, was employed on July 6, 1966, and was unavailable to testify by reason of service in the United States Army, stationed at Fort Gordon, Georgia.

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William E. Black signed his card on June 29, 1966, was employed on July 6, 1966, and was unavailable to testify by reason of service in the United States Army, stationed at Fort Lee, Virginia.

Anna Marie Behe signed her card on June 23, 1966, was employed on July 6, 1966, and was unavailable to testify, having moved from the area and presently residing in Fall River, Massachusetts.

John Mollica, Jr. signed his card on June 10, 1966, was employed on July 6, 1966, and was unavailable to testify by reason of service in the United States Army. His station assignment was not known.

Carol Rinker signed her card on June 3, 1966, was employed on July 6, 1966, and was unavailable to testify by reason of serious illness requiring her hospitalization at the time of the trial.

Millie Edwards signed her card on June 10, 1966, was employed on July 6, 1966, and after diligent search could not be located to testify.

Nancy Tremmel signed her card on June 13, 1966, was employed on July 6, 1966, and after a diligent search could not be located to testify.

David Campbell signed his card on June 14, 1966, was employed on July 6, 1966, and after diligent search could not be located to testify.

Robert D. Shaw signed his card on June 29, 1966, was employed on July 6, 1966, and after diligent search could not be located to testify.

As previously noted the authenticity of the signatures on these 16 cards is conceded, and Respondent objects to

their inclusion among those proffered by the Union only for the reason that it had no opportunity to cross-examine the respective signers and thereby test the validity of the cards.

In this respect Respondent suggests the possibility of direct or indirect coercion, threat or substantial misrepresentation, any instance of which would invalidate the card and possibly cast doubt upon the validity of others. After seven days of hearing and the appearance of approximately 115 witnesses, and with ample time before and after the trial, it seems to me that Respondent has had full opportunity to explore all avenues of possible skulduggery in the procuring of union authorization cards. All that has been revealed, however, and this after vigorous cross-examination and leading questions, is that a number of employees were of the impression that as a result of their signing authorization cards an election would be forthcoming; an impression, incidentally, which, by the nature of its subjective character has been consistently rejected as probative evidence by the Board. [34]

Absent therefore, any evidence, or indeed suggestion that the subject cards, or any others, were procured by subterfuge, coercion, or other devious means, and with the full opportunity to explore such possibilities, generally, I reject Respondent's argument directed in opposition to the admission of the cards into evidence and their inclusion among those proffered by the Union. [35] I will

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[34] Cumberland Shoe Corporation, 144 NLRB 1268, enfd. 351 F.2d 917, 920 (C. A. 6). See also, S.E. Nichols Company, 156 NLRB 1201, enforcement of Section 8(a)(5) remedy denied, ___ F.2d ___ (C. A. 2), 65 LRRM 2655. With all due respect to the Court of Appeals for the Second Circuit I have no alternative but to follow the course of orderly procedure by applying established Board precedent which the Board or the Supreme Court has not reversed. Iowa Beef Packers, Inc., 144 NLRB 615, enfd. 331 __2d 176(C.A.

[35] Mink Dayton,Inc., 166 NLRB No. 79, fn. 30, I. Taitel & Son, 119 NLRB 910, 912, enfd. 261 F.2d 1, 4 (C. A. 7); Northwest Engineering Company, 158 NLRB 624, 629.

49 therefore include among the valid cards supporting the Union's claim of majority status on July 8 the cards of:

Joseph W. Tierney	William E. Black
David Rossbach	Anna Marie Behe
Mary N. Krywokulski	John J. Mollica, Jr.
Sandra Nedimyer	Carol Rinker
Patricia A. Eger	Millie Edwards
Cloyd A. Davis, Jr.	Nancy Tremmel
Rose Dascanio	David Campbell
James Crist	Robert D. Shaw

d. *Individual cards*

The cards of certain other employees require individual consideration which follows:

Janice Yarmish identified her card as being signed by her on June 9, the date indicated on the card. She was not asked if she had read it or knew what the card was.

Clarence Holton identified the signature on the authorization card as his own and the date of June 29 as the one upon which he signed the card. While there is no evidence that he read the card which he signed he was well aware of the Union campaign then in progress and so testified.

Cathleen Vinglass (Kochara) identified her signature on an authorization card which she returned to Employee Smouse. Mrs. Vinglass testified that she did not read the card before she signed it. She did state, however, that when she received the card from Employee Smouse she asked her "if I would sign this union card."

50 Each of the above discussed situations have a common factor—there is no evidence that they read the card before signing it, and in the case of Vinglass, there is evi-

dence that she had not read the card before signing it. Without citing authority for the proposition I am distinctly inclined to the view that in the absence of evidence to the contrary, and in the absence of evidence of fraud and misrepresentation, a person signing a document is presumed to know what it is they have signed and to be bound by the consequences of their action. Secondly, in the absence of fraud or misrepresentation no one has ever been shown to have successfully disavowed his signature to an otherwise valid contract, or indeed to a check, on the protestation that he had not read what he signed. I see nothing more sacred or unusual about the signing of a union membership and authorization card that would permit normal, intelligent people to avoid their voluntary action. Indeed to question the motives and actions of employees contradicts, it would seem, the very freedom of choice upon which the whole selection process depends. I would accordingly include among the cards supporting the Union claim those signed by *Janice Yarmish*, *Clarence Holton* and *Cathleen Vinglass*.

Gary Runk. It appears from the credited testimony of Union Representative Micelli, Gary Runk, and his brother Paul Runk that Gary Runk signed a union authorization card which has since been lost. Thus Gary Runk credibly identified a specimen union authorization card as identical to the one he signed in Mid-June 1966 and mailed.[36] Paul
51 Runk testified that he witnessed the signing and heard his

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[36] Gary Runk was not certain to whom he mailed the card, stating in answer to an inquiry, "I guess to the Labor Relations Board." I do not accept Runks' uncertainty in this matter as disposition of the issue. On the contrary an inspection of authorization cards in evidence discloses that all cards submitted by mail were pre-addressed to union headquarters. I am not disposed to make an exception as to Runk's card merely because his recollection is faulty. I accordingly conclude and find that this card, like all others mailed, was addressed to union headquarters.

brother state that he would mail it. And Micelli credibly testified that Union records disclosed that the card was actually received by it as evidenced by a check mark on the Union's master list of employees which it maintained during the organizing campaign. Upon the foregoing I would find and conclude that Gary Runk timely submitted to the Union a valid union authorization card. [37]

Albert Erculiani and *Richard Erculiani*. A question arose at the hearing respecting the authenticity of the cards of Albert and Richard Erculiani. Although Richard Erculiani acknowledged his own signature and the date on the card, June 23, 1966, a question was raised respecting a dissimilarity between it and specimen signatures in Respondent's files. Upon Richard's credited testimony I deem the signature to be his own and will include the card with those supporting Union's majority claim. Albert Erculiani was not available to testify respecting his card. His brother Richard credibly testified, however, that he witnessed the signing on June 22, 1966. Upon this testimony and that of a handwriting expert called to verify Albert's signature I accept the card as valid and will include it with the others proffered by the Union.

Timothy L. Hale. After identifying his signature on his card, verifying its date and stating he had read it, including the fine print, Timothy L. Hale testified on cross-examination that Employee DeBartolome, in soliciting his signature stated, "All it is is just to get an election in there." Upon the credited denial of this statement by DeBartolome and the testimony of Paul Rider who witnessed the incident I do not accept Hale's testimony that he was told that the card was "just to get an election."

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[37] Queen City Transports, 141 NLRB 964, 973.

On the contrary, upon Hale's testimony that he read the
52 card before he signed it[38] I will include the card with those supporting the Union's claim.

Harry Bliss Burns, on June 1, 1966, signed a card mailed to him by the Union. In doing so he crossed out the word "membership" in the printed sentence which read "I hereby apply for membership, etc.," and substituted the words "information of what you can do for me"; thus causing the corrected sentence on his signed card to read, "I hereby apply for information of what you can do for me." He did not, however, cross out that printed portion which followed, whereby the signer authorized and designated the Union to represent him as bargaining representative.

At first glance it would appear that Burns' corrections on the card would be dispositive of its validity. At the trial, however, I sought to satisfy myself as to the purpose of the corrections he made on the card and the following colloquy occurred:

> TRIAL EXAMINER: You have made this offer and I have some questions to ask him about this whole transaction myself. Why did you scratch out the word "membership?"
>
> THE WITNESS: Because I didn't want membership.
>
> TRIAL EXAMINER: You didn't want to be a member?
>
> THE WITNESS: I didn't know anything about it.
>
> TRIAL EXAMINER: You also say in your statement (the witness' pretrial affidavit) ". . . I did not want to become a member. At that time I did not intend to authorize the Union to represent me." Why didn't you scratch that out?
>
> THE WITNESS: No reason.

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[38] N.L.R.B. v. Sagamore Shirt Co., supra.

TRIAL EXAMINER: No reason. But you didn't. When you decided that you didn't want to be a member you specifically scratched out. At the time you signed this, did you also not want the Union to represent you?

THE WITNESS: Yes, I suppose so. If I wasn't a member they could not represent me.

TRIAL EXAMINER: That is not what I asked you.

53 MR. FIRST: That is his understanding.

THE WITNESS: That is my understanding.

TRIAL EXAMINER: At the time that you signed this card, did you want the Union to represent you or did you not want the Union to represent you?

THE WITNESS: Well I thought membership, I thought if you were a member or something they represented you. If you wasn't a member they didn't.

TRIAL EXAMINER: You read the card, didn't you?

THE WITNESS: Yes sir.

TRIAL EXAMINER: You see what it says on the card, read it again. There are two segments to that statement. One has to do with membership and the other has to do with authorization. You specifically scratched out membership because you didn't want to be a member. If as you said you didn't want them at that time to represent you why didn't you do in that respect as you did with regard to membership and scratch it out?

THE WITNESS: I really didn't give it that much thought I guess. (Tr. 778)

Upon a consideration of the entire record, particularly Burns' admission that he read the card, and upon my observation of him as an astute person, I am persuaded that he knowingly intended that the authorization portion of the card remain intact, that he was not then persuaded to actually join the Union, and that he knowingly differentiated

between union membership and authorization for majority representation. I would therefore include Harry Bliss Burns' card among those proffered by the Union in support of its majority claim.

Robert J. Franke first testified that he received his authorization card from Employee DeBartolome, that he did not read the card when he signed it on June 29, and that two days earlier DeBartolome had told him that they needed 50 percent to 75 percent of the employees signed up to get an election. This, Franke testified, was the only reason
54 he signed the card.

After exhaustive examination of Franke his further testimony disclosed that he had actually received and signed two identical cards, but at different times, one after the June 29 signing. He also testified that he actually had read a second card that he signed. He reasserted his statement, however, that he did so only to get an election.

A review of Franke's testimony persuades me that he indulged in a pattern of deliberate evasion, attempting to withhold the fact that he signed *and* read a second card. I therefore do not credit him, excepting only his admission that he did read the second identical card which he signed.

Franke having admitted to reading the second card I do not believe that he signed it or the first one for some purpose less than he actually knew it to be for. I therefore direct that the card which *Robert Franke* signed on June 29 be included among those proffered by the Union in support of its majority status.

Walter Carothers identified his signature on his authorization card and verified the date upon which he signed it, May 24, 1966. After some confused testimony as to the

manner in which he received the card he testified on cross-examination that in the course of the union representatives' solicitation of his signature he was told, "If you didn't sign one there would be a fee of $25 if they got in and you didn't sign the card." Union Representative Macelli was later called as a rebuttal witness by General Counsel but was not questioned on the subject. Union Representative Mastandria, similarly called, was asked if he advised Carothers in the manner previously described, and his only answer was, "No sir, I don't think I met the gentleman." [39] In this state of the record I deem Carothers' statement substantially undenied and I credit it.

Clearly Carothers was being offered an economic inducement to sign a card authorizing the Union to represent him. Because such conduct stands on no different footing than an economic inducement by an employer to an employee that he forego union representation, I have no hesitancy in equating the former with the latter, concluding that on its face the Union's offer invalidates Carothers' card. I would accordingly direct that it not be counted. Because, however, there is no evidence whatever that Carothers' experience constituted a practice or pattern of conduct on the part of the Union I reject the suggestion that the Union's majority status would be destroyed, other than by the elimination of Carothers' card. [40]

Elizabeth Park credibly testified that she signed her card some time prior to the beginning of the plant vacation on

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[39] Over Respondent's objection I permitted counsel for the General Counsel to question a witness in such a manner as to impeach an earlier witness by the General Counsel. I reaffirm my ruling at this time upon the authority of Plumbers & Steamfitters Union Local 100, 128 NLRB 398, citing Wigmore on Evidence, Sec. 907 (3rd Ed. 1940).

[40] Cf. Gafner Automotive and Machine, Inc., 156 NLRB 577; Ottenheimer and Company, Inc., 144 NLRB 38.

July 11, 1966.[41] Although she testified to not having read the card she was aware that it concerned getting the Union into the plant. She further testified that when Employee Mary Blake gave her the card to sign she said, "Well, practically everyone is voting for the Union." To which Mrs. Park replied, "Well, I will vote too," and signed the card. On cross-examination when asked if she would have signed the card if she had known that everyone was not signed she replied, "No, I wouldn't have signed it."

56 When it is misrepresented to an employee that a majority of the employees had already signed cards and it has been established that solely in reliance upon the information the employee then signs the authorization card, it is now well settled that such a card is not valid for the purpose of establishing a majority claim.[42] By her own credited admission Mrs. Parks asserts that she would not have signed the card but for the misrepresentation of Employee Blake. I accordingly direct that the card of Elizabeth Park not be included among those proffered by the Union to establish its majority status.

Janie Long credibly testified that she signed a union authorization card without reading it on June 11, 1966. She testified further on cross-examination that she did not know the employee who gave her the card to sign but she did recall that she was told that the card was just for an election and she testified that she would not have signed it otherwise. Because Miss Long has thus signed her card solely upon the misrepresentation that she was doing

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[41] Upon the credited testimony before me I view the dates of "7/30/66" inscribed by Mrs. Park on her authorization card as incorrect and find it to be actually June and not July.

[42] I. T. T. Semi-Conductors, Inc., 165 NLRB No. 98, citing Home Pride Provision, Inc., 161 NLRB No. 47; N. L. R. B. v. Sagamore Shirt Company, supra; Merrill Engineering Laboratories, 158 NLRB 1113.

so only to get an election I will direct, in conformity with established precedent,[43] that her card not be counted.

e. *Recapitulation*

By way of recapitulation I conclude and find that the Union proffered to the Respondent on July 6, 1966 a total of 106 valid, authenticated cards signed by its employees authorizing the Union to represent them for the purposes of collective bargaining.

57

f. *Conclusions*

In the bargaining unit agreed upon as appropriate I have found that on July 6, 1966, the date upon which the Union requested recognition as the majority representative of Respondent's employees, there were 208 eligible employees. To constitute a numerical majority 105 of these would be required to have authorized the Union to represent them. On the basis of the findings I have made herein I conclude and find that, as of July 6, 1966, 106 of these employees did so, having signed authorization cards which I find to be valid, authentic designations.

Respondent's refusal to acquiesce in the Union's request to submit these authorization cards to a neutral third party for the purpose of checking its majority claim is based, it is true, upon the assertion that the Employer had a good faith doubt as to the existence of such majority status and a doubt as to the character of the cards themselves. This refusal to recognize and bargain with the Union must be examined, however, in the light of all the relevant facts, including the conduct of the Employer contemporaneous

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[43] Peterson Brothers, Inc., 144 NLRB 679, enfd. 342 F. 2d 221 (C. A. 5).

with the initiation of the Union's organizing campaign and the sequence of events which followed. [44]

Even as the Union announced in a letter addressed to the employees its plan to organize them Respondent admittedly instituting its own campaign "to sell the Company" and in the process engaged in a profusion of conduct which I have already found to constitute unlawful interference, restraint and coercion. Where, as here, the Union, in fact, represents a majority of the employees as shown by the analysis of the signed cards relied upon by it in its request for recognition and bargaining, and the Employer has anticipated this by engaging in activity designed to thwar
58 the Union and undermine its majority status the Board may properly remedy such unlawful conduct and restore the *status quo* by requiring that the Employer bargain with the Union, all quite apart from the Employer's consistent willingness to go through with an election. [45] Moreover, it is well settled that where, as here, timely and meritorious objections to the election have been filed by the Union the Board may, as proper restoration of the *status quo*, require bargaining even though the Union participated in the election and lost. [46]

Upon consideration of the foregoing, therefore, and upon the basis of the findings and conclusions I have made herein I conclude and find that by refusing to recognize and bargain with the Union upon its presentation of 106 valid cards signed by the employees designating it to repre

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[44] Joy Silk Mills, Inc., 85 NLRB 1263.

[45] See, e.g. N.L.R.B. v. Model Mill Company, Inc., 210 F.2d 829 (C.A. 6); N.L.R.B. v. Armco Drainage and Metal Products, Inc., Fabricating Division, 220 F.2d 573, 577 (C.A. 6), cert. den. 350 U.S. 838.

[46] Irving Air Chute, Company, Inc., Marathon Division, 149 NLRB 627 affd. 350 F.2d 176 (C.A. 2).

sent them the Respondent then and thereafter refused to bargain with the Union in violation of Section 8(a)(5) of the Act.

F. *The objection to the election*

As previously noted, the Union, on August 19, 1966, filed timely objections to conduct affecting the elections and a hearing on these objections were consolidated with the instant proceeding. A review of the pleadings in this respect discloses that the objections raised are substantially identical with the allegations of violations of Section 8(a)(1) and (3) in the Complaint. To the extent, therefore, that I have already treated of these allegations and found certain of them to constitute unlawful conduct, as alleged, it would be an undue burden upon the record and the reader to reiterate these findings in a parallel context. Suffice it to say that in the instances of interference, restraint
59 and coercion which I have already found (*supra*, pp. 5-15) it is an *a fortiori* conclusion that such conduct interferes with the exercise of the free choice of voters necessary for an election.[47] Accordingly, I shall recommend that the representation election heretofore held in Case No. 6-RC-4185 be set aside.

V. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section IV, above, occurring in connection with its business operations described in Section I, above, having a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor dis-

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[47] Irving Air Chute, Inc., Marathon Division, supra.

putes burdening and obstructing commerce and the free flow of commerce.

VI. The Remedy

It has been found that Respondent has violated the Act in certain respects. I will accordingly recommend that an Order issue requiring Respondent to cease and desist therefrom and to take affirmative action which will effectuate the policies of the Act. Nothing herein shall be deemed, however, as requiring Respondent to vary such vacation and holiday pay arrangements as have been made as described herein. [48]

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as
60 amended, I recommend [49] that Boyer Bros., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Offering additional paid holidays, improved vacation benefits, and promotion to supervisory jobs to its employees as inducements to their voting against Bakery and Confectionery Workers' International Union of America or any other labor organization.

(b) Interrogating its employees unlawfully as to their union membership and activity.

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[48] Golden State Bottling Co., Inc., 147 NLRB 410.

[49] In the event that this Recommended Order is adopted by the Board, the words "RECOMMENDED" shall be deleted from the caption and wherever else it appears thereafter, and for the words "I RECOMMEND" they shall be substituted "THE NATIONAL LABOR RELATIONS BOARD HEREBY ORDERS."

(c) Creating among its employees the impression that their individual union activities and sentiments were known to it.

(d) Stating its refusal to grant hospitalization benefits to its employees in any bargaining negotiations in which it might thereafter engage.

(e) Threatening its employees it would close its plant in the event the aforesaid union won the election.

(f) Assigning its employees to jobs inferior to their classification in reprisal for their support of the aforesaid union or any other.

(g) Publishing in its employee information materials and otherwise informing employees that they are prohibited from engaging in union activity on plant property.

(h) Refusing to bargain collectively with Bakery and Confectionery Workers' International Union of America as the exclusive representative of employees in the following unit found to be appropriate for the purposes of collective bargaining:

All production and maintenance employees, truckdrivers and shipping and receiving employees at the Employer's Altoona, Pennsylvania plant; excluding all other employees, office clerical employees, guards, professional employees, line supervisors, and all other supervisors as defined by the Act.

61 (i) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found appropriate and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Altoona, Pennsylvania plant, copies of the notice attached hereto as "Appendix." [50] Copies of said notice, to be furnished by the Regional Director for Region 6 shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify said Regional Director in writing within 20 days from the receipt of the Trial Examiner's Decision what steps it has taken to comply therewith. [51]

62 IT IS FURTHER ORDERED that the election in Case No. 6-RC-4185 be set aside.

Dated at Washington, D.C. October 26, 1967.

.....
/s/ Thomas F. Maher
Trial Examiner

Oct. 26, 1967

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[50] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[51] In the event that this Recommended Order be adopted by the Board this provision shall be modified to read: "Notify the said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX F

[fol. 1]

ORDER OF REMAND

Order dated August 18, 1969

In No. 17,843 in the United States Court of Appeals
For the Third Circuit

BEFORE: VAN DUSEN, and STAHL, Circuit Judges.

This cause coming on for hearing on August 5, 1969, on petitioner's unopposed motion to remand, and the Court being fully advised in the premises, it is

ORDERED by the Court that the Board's motion be granted and that the entire case be remanded to the Board for reconsideration in the light of *National Labor Relations Board v. Gissel Packing Co., et al*, ... U.S. ..., 89 S. Ct. 1918.

BY THE COURT

/s/ Francis L. Van Dusen

Dated: August 18, 1969

APPENDIX G

SUPPLEMENTAL DECISION AND ORDER OF THE ADMINISTRATIVE AGENCY INVOLVED

[fol. 1] Supplemental Decision and Order
Of The National Labor Relations Board

Dated March 3, 1970

On April 5, 1968, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, and ordering the Respondent to cease and desist therefrom, to bargain with the Union, and to take other affirmative action designed to effectuate the policies of the Act.

On June 16, 1969, the Supreme Court of the United States issued its Opinion in *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575, in which it laid down certain guidelines relative to the propriety of finding violations of Section 8(a)(5), and issuing orders to bargain based upon such violations or violations of other sections of the Act. Thereafter, the United States Court of Appeals for the Third Circuit remanded the instant proceeding to the Board for reconsideration in view of the Supreme Court's Opinion.

[fol. 2] On August 27, 1969, the Board, by its Associate Executive Secretary, issued a Notice in-

[1] 170 NLRB No. 119.

forming the parties that statements of position with respect to the above-stated issue would be accepted for consideration by the Board on or before September 10, 1969. The General Counsel and the Respondent filed Statements of Position, and the Respondent filed a Supplement thereto.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has considered the statements of position, the supplement, and the entire record in this proceeding and, having reconsidered the matter, has decided, for the reasons set forth below, to affirm its original finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the bargaining representative of its employees and that a bargaining order is an appropriate remedy herein.

The record shows that between the latter part of May 1968, when the Union commenced its organizing campaign among the Respondent's employees, and July 7, when the Respondent received the Union's request for recognition and bargaining, 106 of the Respondent's 207 employees signed cards clearly authorizing the Union to represent them in collective bargaining.[2]

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[2] The Respondent, in its statement of position and supplement thereto, renews its claim that at no time did the Union possess valid authorization cards signed by a majority of employees. Among other things, the Respondent asserts that the authorization cards signed by Elizabeth Park and Gary Runk, as well as those bearing signatures solicited by Betty Henry, a supervisor, should not be counted in ascertaining the Union's majority status. We disagree, for the reasons stated in our original Decision, and for the reasons stated herein.

In the case of Park, objective facts, as evidenced by events contemporaneous with the signing, do not show that the alleged misrepresentation made to Park, to the effect that "practically everyone" had signed, was the decisive factor in causing her to sign. Marie Phillips, Inc., 178 NLRB No. 53. Accordingly, we shall count her card.

(continued)

[fol. 3] Appendix G

The record also shows that the Respondent, upon learning of the Union's organizing campaign, undertook a vigorous and unlawful effort to undermine employee support for the Union. This effort continued unabated even after the election herein was held.[3] Thus, at various times material hereto, the Respondent, among other things, promulgated and enforced an unlawful rule against union solicitation

([2] continued) The credited testimony shows that Gary Runk signed an authorization card and caused it to be delivered to the Union, and further, that the Union received Runk's card prior to its bargaining request. In these circumstances, we shall count Runk's card, notwithstanding that it was subsequently lost and was not introduced into evidence at the hearing.

Betty Henry solicited signatures on authorization cards and generally manifested her support for the Union before any claim was made by the Respondent that she had supervisory status. Indeed, the Respondent and the Union had stipulated for purposes of the election that Henry, and 11 others employed in the same category, were eligible to vote. Thereafter, the Trial Examiner held, and we agreed, that Henry and the 11 others employed in the same category, were eligible to vote. Thereafter, the Trial Examiner held, and we agreed, that Henry and the 11 othere were supervisors. This precluded the use of their cards in ascertaining the Union's majority status. It is also true that, as a general rule, the Board will not accept cards solicited by supervisors as evidence of majority status. However, in the circumstances of this case, we hold that the cards solicited by Henry may be used for this purpose. The fact that Henry was represented by the Respondent not to be a supervisor, that she was, in fact, discharged for demonstrating her support for the Union, and that the Respondent itself undertook an intensive and unlawful campaign to defeat the Union, rebuts any presumption that Henry's solicitation of cards might have coerced employees into designating the Union against their wishes. See also Aero Corporation, 149 NLRB 1283, 1286-1287, affd. 363 F.2d 702 (C.A.D.C.).

[3] The Union, though possessing valid authorization cards signed by a majority of the employees, failed to receive a majority in the August 17, 1966, election, the results of which were set aside because of the Respondent's unlawful conduct.

at any time on its premises; interrogated employees with respect to their union activities, sympathies, and the activities of other employees; threatened to close its plant if its employees selected the Union; threatened
[fol. 4] to discharge employees if they continued to engage in union activities; gave employees the impression that it maintained surveillance of their union activities; held out to one employee the prospect of promotion after urging him to consider carefully the consequences of voting for the Union; promised employees improvements in holiday and vacation benefits, and timed announcements of the promised improvements in a manner calculated to influence the outcome of the election; and assigned onerous work to one individual because of his activities on behalf of the Union. In our original Decision, we adopted the Trial Examiner's conclusion that the Respondent's unlawful conduct, described above, was "designed to thwart the Union and undermine its majority status."

Having carefully reconsidered this matter in the light of *Gissel Packing Company*, *supra*, we are of the opinion that the Respondent's
unfair labor practices, which began soon after the Respondent learned of the Union's organizing campaign and continued even after the election herein was held, were substantial and pervasive in nature and necessarily had a damaging impact upon our election processes so that the application of traditional remedies for the unlawful conduct would not, with sufficient certainty, have permitted a fair rerun election. [4] In our opinion, the unambiguous cards

4 The Respondent's unlawful conduct is sufficiently pervasive to justify a bargaining order even in the absence of a finding that such conduct violated Section 8(a)(5) of the Act.

validly executed by a majority of the employees in the unit represent a more reliable measure of employee desires on the issue of representation than would a rerun election, and the policies of the Act will be best effectuated by reaffirming our original Decision and Order, finding that the Respondent violated Section 8(a)(5) of the Act and requiring that it bargain, upon request, with the Union here involved.

[fol. 5] SUPPLEMENTAL ORDER

In view of the foregoing, and on the basis of the entire record herein, the National Labor Relations Board hereby reaffirms its Decision and Order of April 5, 1968, entered in this proceeding.

Dated, Washington, D. C. Mar. 3, 1970

.....
Frank W. McCulloch, Chairman

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–126

BOYER BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Board held that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act by engaging in a pattern of unlawful conduct designed to undermine its employees' support of Bakery and Confectionery Workers' International Union, and by refusing to recognize and bargain with the Union. The Board ordered petitioner to bargain with the Union, finding that the latter had obtained valid authorization cards from a majority of the unit employees and that, in view of petitioner's "substantial and pervasive" unfair labor practices, these cards provided a more reliable measure of employee representation sentiment than would be an election (Pet. App. 82–86a).

2. Petitioner's contention relates to the solicitation of the cards of two employees, Rinker and Reeseman. After the close of the hearing before the Trial Examiner, petitioner moved the Board to reopen the record to take evidence concerning these cards on the ground that they were solicited by Betty Henry, a supervisor. The Board denied the motion (Pet. App. 22a). The reasoning of the Board was explained in its subsequent Supplemental Decision (Pet. App. 83a–84a, n. 2). It assumed that supervisory solicitation had occurred but concluded that, in the circumstances of this case, it could not have affected the validity of the cards solicited (Pet. App. 84a, n. 2).[1] The court below rejected the Board's reasons for finding supervisory solicitation to be immaterial, if it occurred. But it held that the Board's refusal to reopen the record with respect to Reeseman's card was not an abuse of discretion, since the matters concerning Henry's alleged solicitation set forth in Reeseman's post-hearing affidavit were known to her at the time of the hearing and there was no excuse for counsel's failure to elicit testimony thereon at the hearing (Pet. App. 16a–17a).[2] The court accordingly counted Reeseman's card, which gave the Union a one-card ma-

[1] The Board relied, *inter alia*, on the fact that Henry was represented by the company not to be a supervisor, and that she was ultimately discharged for demonstrating her support for the Union.

[2] The court added that "Reeseman's testimony at the hearing was extremely weak, culminating in her admission that not all of the contents of an affidavit previously sworn to by her was true" (Pet. App. 17a, n. 11).

jority,[3] and enforced the Board's bargaining order (Pet. App. 18a).

3. The question raised in the petition (pp. 3, 7)—whether a reviewing court may properly set aside a finding of the Board to which no exception was taken—is not presented here. As the court of appeals noted (Pet. App. 14a), the issue of supervisory solicitation of authorization cards was raised before the Board by petitioner's motion to reopen the record, and the Board, after consideration, denied the motion. The court of appeals, in finding that Reeseman's card was not tainted by supervisory solicitation, thus did not pass on an issue which had not previously been presented to the Board, but merely sustained the Board's action on different grounds. The cases cited by petitioner (Pet. 8–9) are inapposite, for there, unlike here, the issue had not been raised before the agency.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

AUGUST 1972.

[3] The court invalidated the card of Rinker. It found that the evidence of supervisory solicitation in her post-hearing affidavit was newly discovered, since she had been unable to appear and testify at the hearing due to serious illness.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-126

BOYER BROTHERS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

REPLY BRIEF FOR THE PETITIONER COMPANY

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER COMPANY

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This reply brief is filed under Rule 24, Paragraph 4 of the Court addressed to the argument of the National Labor Relations Board raised in the Board's memorandum in opposition to the company's Petition which argument has not heretofore been advanced by the Board.

1. As stated in the company's Petition, the issue before this Court has narrowed to a finding made by the National Labor Relations Board concerning a company supervisor, Betty Henry. The Board made a finding that "Betty Henry solicited signatures on authorization cards" (Pet. App. 84a, n. 2).

2. No exceptions were taken to this Board finding nor was any attempt made to show that extraordinary circumstances prevented the parties from objecting to such Board finding. Section 10(e) of the National Labor Relations Act provides in pertinent part as follows:

> " ... no objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances ..." 49 Stat. 454, as amended, 29 U.S.C. Sec. 160(e).

3. Notwithstanding the provisions of Section 10(e) of the Act the Court below overruled subject Board finding by stating:

> "We conclude that the Board's finding that Betty Henry had solicited signatures is not supported by substantial evidence" (Pet. App. 18a).

4. The Board in its memorandum attempts to justify the lower Court's ruling by combining two issues which are entirely separate. One issue relates to a post-hearing company motion that contained supporting affidavits from employees Rinker and Reeseman in which the company sought to adduce evidence concerning solicitation by supervisor Betty Henry of union authorization cards from employees. The Court below held on that issue it was not an abuse of discretion for the Board to refuse to re-open

the record to take additional evidence (Pet. App. 16a). However, another issue is whether the Court below is permitted to overrule the specific Board finding that supervisor Betty Henry had, in fact, solicited union authorization cards. The lower Court's ruling on the issue of whether the Board should have allowed the taking of additional evidence—the issue discussed by the Board in its memorandum to this Court—must of necessity be treated separate and apart from whether the lower Court is permitted to test the sufficiency of evidence in support of the finding, made by the Board in its supplemental decision, that Betty Henry solicited union authorization cards. What the lower Court has attempted to do is to test the sufficiency of the Board's subject unexcepted-to finding. It is precisely such practice that this Court has refused to permit and it is strongly submitted that the lower Court should not have disturbed the Board finding in the absence of exceptions being filed to such finding. *N.L.R.B. v. Ochoa Fertilizer Corporation*, 368 U.S. 318, 322; *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 388-389; *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253; *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 386; *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350; *N.L.R.B. v. District 50, United Mine Workers of America*, 355 U.S. 453, 463-464.

CONCLUSION

In the absence of exceptions, the lower Court was clearly in error in attempting to test the sufficiency of the particular Board finding herein involved and it is submitted that the case should be remanded to the lower Court for further consideration.

Respectfully submitted,

GEORGE V. GARDNER,
ASA AMBRISTER,

Counsel for Petitioner.